80-180

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

NO._____

W. C. McDANIEL, ET AL.,
Petitioners

v.

JOSE SANCHEZ, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in holding that a reapportionment plan for the four commissioners precincts of Kleberg County, Texas was not court-ordered and could not be implemented until precleared under Section 5 of the Voting Rights Act, 42 U.S.C. 1973(c), when the plan (a) was prepared and presented in response to an order by the district court, (b) was not prepared by county officials but by a third party expert, (c) was not adopted by the county before submission to the court, (d) was considered by the trial court to be court-ordered, and (e) was put into effect only after county officials were ordered to do so by the trial court?

2. Since the facts underlying the preparation and implementation of the Kleberg County reapportionment plan were identical to those in *East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), in which it was held that a plan so conceived and presented was court-ordered and required no Section 5 preclearance, did the Court of Appeals err in holding that the plan was legislative, and that the trial court had no authority to assess the plan's constitutionality and order it into effect without Section 5 preclearance?

PARTIES TO THE PROCEEDING

Petitioners, who were appellees in the Court of Appeals and defendants in the District Court, are W. C. McDaniel (County Judge of Kleberg County, Texas), V. T. Collins, Earl Hubert, and Doyle Dreyer (Kleberg County Commissioners), Ura Dean Ware (Kleberg County Clerk), and J. S. Scarborough III (Kleberg County Sheriff).

Respondents, who were appellants in the Court of Appeals and plaintiffs in the District Court, are Jose Sanchez, Israel Trevino, Natividad De La Rosa and Santos De La Rosa, who sued "on their own behalf and on behalf of all registered voters" and on behalf of all "similarly situated Mexican-American voters residing within County Commissioners' Precincts 1, 2 and 3." (Plaintiffs' First Amended and Supplemental Complaint, paragraphs 19 and 20)

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Petitioners, W. C. McDaniel (County Judge of Kleberg County, Texas), V. T. Collins, Earl Hubert, Doyle Dreyer (Kleberg County Commissioners), Ura Dean Ware (Kleberg County Clerk), and J. S. Scarborough III (Kleberg County Sheriff), respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this cause on April 14, 1980.

OPINIONS BELOW AND IN THIS COURT

The following, listed in chronological order, are the pertinent opinions and orders of the trial court and of the United States Court of Appeals for the Fifth Circuit:

(1) The District Court's Memorandum and Order of October 2, 1979 finding a constitutionally impermissible numerical disparity between the four Kleberg County Commissioners precincts but finding no dilution of Mexican-American voting strength, and ordering that a new plan be prepared. (Appendix, p. A-1)

(2) The District Court's Order, dated January 10, 1980, declaring the new reapportionment plan to be constitutionally acceptable, finding that the plan was court-ordered rather than legislative such that preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. 1973(c), was not required, and directing that the 1980 primary and general elections be conducted thereunder. (Appendix, p. A-21)

(3) The District Court's Order of January 29, 1980 noting that the Court had "filed an order implementing a new apportionment plan for the 1980 elections" and denying respondents' motion for injunction pending appeal. (Appendix, p. A-24)

(4) Opinion Order of the United States Court of Appeals for the Fifth Circuit, dated April 14, 1980, declaring that the reapportionment plan in question was legislative rather than court-ordered, vacating the judgment of the trial court, and remanding the case for appropriate action. Reported at 615 F.2d 1023. (Appendix, p. A-26)

(5) Notification from the Clerk of the United States Court of Appeals for the Fifth Circuit, dated April 25, 1980, of the issuance on that date of the Court's Mandate. (Appendix, p. A-30)

(6) Order of the District Court, dated April 30, 1980, denying respondents' motion to enjoin the conduct of the May 3, 1980 primary election of county commissioners in Kleberg County. (Appendix, p. A-31)

(7) Letter from the Clerk of the United States Court of Appeals for the Fifth Circuit, dated May 12, 1980, advising that on that date petitioners' motion for rehearing and for rehearing en banc had been denied. (Appendix, p. A-33)

(8) District Court's Order, dated June 20, 1980, directing petitioners to immediately begin Section 5 preclearance procedure with respect to the plan for reapportionment of the commissioners precincts of Kleberg County. (Appendix, p. A-34)

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was rendered on April 14, 1980 (Appendix, p. A-26) and the mandate was issued on April 25 (Appendix, p. A-30). A petition for rehearing and for rehearing en banc was overruled on May 12, 1980 (Appendix, p. A-33).

This Court has jurisdiction to review the opinion rendered below pursuant to the provisions of Title 28 U.S.C. § 1254.

STATEMENT OF THE CASE

In Texas the Commissioners Court is the governing body of a county. It consists of a county judge and four commissioners. The county judge is elected countywide. One county commissioner is elected from each of four commissioners precincts into which the county is divided pursuant to state law, and serves for a term

of four years. The terms are staggered; two commissioners are elected every two years.

This class action, filed on January 26, 1978, asserted that the populations of the four commissioners precincts of Kleberg County, Texas were so unequal as to violate the constitutional one man, one vote principle and, in addition, that the existing boundary lines of the four precincts divided Mexican-Americans and Anglos in such a fashion as to unconstitutionally dilute the voting strength of Mexican-Americans. Among the relief sought in Plaintiffs' First Amended and Supplemental Complaint was a judgment "granting plaintiffs: . . . (d) the adoption" of a new election plan.

Jurisdiction in the trial court was based upon the provisions of 28 U.S.C. 1343 (3) and (4) which give a United States District Court original jurisdiction of all suits brought pursuant to 42 U.S.C. 1983 to redress deprivation under color of state law of any right, privilege or immunity secured by the Constitution of the United States.

After a trial on the merits the district court concluded that reapportionment was necessary to correct population disparities, but found that there had been no dilution of the voting strength of Mexican-Americans. The court "directed" the defendants* to submit a proposed new plan by November 13, 1979 and scheduled and conducted a hearing thereon on December 10, 1979. (Memorandum and Order of October 2, 1979; Appendix, p. A-1)

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* The parties will henceforth be referred to as they were in the trial court: the petitioners-county officials were defendants and respondents were plaintiffs.

Plaintiffs filed no objection to the order, to the proposed procedure, nor to the reapportionment plan which was served upon them and filed with the Court as directed. At the December 10 hearing they attacked with expert testimony the manner in which the plan distributed Mexican-Americans among the four precincts and, for the first time, orally objected to the plan because it had not been precleared under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c).

The evidence heard by the Court on December 10 established that the plan submitted to the Court had been prepared by Dr. Robert T. Nash, Dean of the Business School of Texas A&I University. (R. 7) Nash had been given no instructions by the defendants other than that he was to draw commissioners precinct boundary lines which would achieve equality of population. (R. 22)

It was undisputed that the Commissioners Court had not adopted the plan which Nash prepared, nor otherwise purported to reapportion itself. It had merely voted that the plan be submitted to the Court for its action thereon, as ordered. Formulated in December, as it was, the plan was one which the Commissioners Court was prohibited by state law from adopting since it altered the makeup of the county's voting precincts. (R. 12-13; Article 2.04, Texas Election Code) As the Court of Appeals specifically acknowledged, the Commissioners Court did nothing more than "[review] Dr. Nash's work and officially [adopt] his proposal *as the plan it would submit to the district court.*" (Fifth Circuit Opinion, Appendix, p. A-27) (emphasis added)

After considering evidence on the Nash plan from all parties, the district court concluded that the plan re-

medied the malapportionment previously found. Relying on *East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), the court held that the plan was court-ordered rather than legislative and that it was therefore not subject to the preclearance provisions of Section 5 of the Voting Rights Act; it ordered that "the 1980 primary and general elections should be conducted" thereunder. (District Court's Order of January 10, 1980; Appendix, p. A-23)

Dissatisfied because the trial court did not require preclearance of the plan under Section 5 of the Voting Rights Act, the plaintiffs perfected an appeal to the Court of Appeals for the Fifth Circuit and, in connection therewith, requested a summary reversal or, in the alternative, an injunction against the conduct of the scheduled May, 1980 election of two county commissioners pursuant to the plan.

In a *per curiam* opinion dated April 14, 1980, a panel of the Fifth Circuit, citing only *Wise v. Lipscomb,* 437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978), and with no mention at all of *East Carroll Parish,* held that the plan was legislative, that it required Section 5 preclearance, and that the "district court erred in considering the constitutionality of the proposed plan." It vacated the trial court's order and remanded the case on April 14, notwithstanding that the primary election was scheduled for May 3. (Fifth Circuit's Opinion; Appendix, p. A-26)

Defendants promptly moved for a rehearing and a rehearing en banc. While the motion was pending, plaintiffs requested the trial court to enjoin the imminent primary election. The trial court permitted the election

to proceed, but enjoined announcement of the results. (Order of April 30, 1980; Appendix, p. A-31)

On May 12, 1980, the Fifth Circuit denied defendants' petition for rehearing. (Letter Notice; Appendix, p. A-33) Plaintiffs returned to the trial court once again, this time to seek an order directing defendants to commence Section 5 preclearance procedures immediately. Defendants responded that such an order would render moot their petition to this Court for certiorari. After hearing evidence and argument, the trial court directed defendants to commence preclearance procedures "immediately." (Order of June 20, 1980; Appendix, p. A-34) A stay of this order is presently being sought.

In the meantime, this petition has been timely filed to seek a correction of the Fifth Circuit's erroneous holding that the plan which the trial court ordered into effect was not court-ordered, and that Section 5 preclearance was therefore required.

REASONS FOR ALLOWING THE WRIT

Two good reasons exist for granting this petition for writ of certiorari. The first is that there will be a substantial volume of reapportionment litigation in the wake of the 1980 census as various governmental subdivisions redistribute their populations for voting purposes. As the racial or ethnic impacts of the newly adopted plans are challenged and changes are ordered, litigants and the lower courts will need to know the circumstances under which a plan will be considered legislative and subject to preclearance under Section 5 of the Voting Rights Act and when it will be considered court-ordered and need not be precleared.

The second reason for granting this petition is that the panel below concluded that the plan ordered into effect by the trial court was not court-ordered, and therefore was subject to Section 5 preclearance, citing only *Wise v. Lipscomb,* 437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978) in support, and ignoring completely this Court's decision in *East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) and a different Fifth Circuit panel's decision in *Marshall v. Edwards,* 582 F.2d 927 (1978), *cert. den.,* 442 U.S. 909, 99 S.Ct. 2820, in both of which the facts surrounding the formulation and submission of the plan were identical to those in the instant case, but in both of which a contrary conclusion was reached—that the plans were court-ordered and not subject to preclearance. In short, the Fifth Circuit panel committed an egregious error which should be corrected here.

Thus far this important question of when a court-inspired plan must be precleared has been relegated to footnote treatment in two of this Court's decisions, *East Carroll Parish School Board v. Marshall, supra* at note 6, and *Morris v.Gressette,* 432 U.S. 491, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977) at note 8, and to a decision in which a majority of this Court could agree on the result but not the reasons therefor—*Wise v. Lipscomb, supra.*

The little that has been written on the subject has left confusion in its wake. See *Marshall v. Edwards,* 582 F.2d 927, 932-33 (5th Cir. 1978), *cert. den.,* 442 U.S. 909, 99 S.Ct. 2820, in which a panel of the Fifth Circuit acknowledges its uncertainty and struggles to reconcile what has been said.

In *East Carroll Parish,* a police jury and school board, held to be malapportioned to an unconstitutional degree, prepared and filed a reapportionment plan pursuant to court order. The trial court approved the plan as submitted. Dissatisfied parties appealed from that order on the ground that it diluted the black vote. The United States filed an *amicus* brief with the Supreme Court in which it argued that Section 5 preclearance was required prior to adoption by the district court of a reapportionment plan submitted to it on behalf of a local legislative body that was covered by the Act. This Court disposed of the contention in the following language:

> [C]ourt-ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by § 5. Had the East Carroll police jury reapportioned itself on its own authority, clearance under § 5 of the Voting Rights Act would clearly have been required. *Connor v. Waller,* 421 U.S. 656, 95 S.Ct. 2003, 44 L.Ed.2d 486 (1975). However, in submitting the plan to the District Court, the jury did not purport to reapportion itself in accordance with the 1968 enabling legislation, see n. 2, *supra* and statutes cited therein, which permitted police juries and school boards to adopt at-large elections. . . . Moreover, since the Louisiana enabling legislation was opposed by the Attorney General of the United States under § 5 of the Voting Rights Act, the jury did not have the authority to reapportion itself. * * * Since the reapportionment scheme was submitted and adopted pursuant to court order, the pre-clearance procedures of § 5 do not apply. *Connor v. Johnson,* 402 U.S. 690, 691, 91 S.Ct. 1760, 1761, 29 L.Ed.2d 268, 270 (1971).

East Carroll Parish School Board v. Marshall, 424 U.S. 636 n. 6, 96 S.Ct. 1083 n. 6, 47 L.Ed.2d 296 (1976).

Precisely the same circumstances existed in the instant case. Petitioners submitted a plan in obedience to a court order to do so; they did not presume to reapportion the county "on their own authority." And they were prohibited by State law from reapportioning the county at the time the plan was submitted since it altered voting precincts in the county (R. 12-13) and such changes may be made only during a July or August term. Texas Election Code, Article 2.04(1). The Texas courts have construed this provision to mean that the commissioners court has no authority to redraw precinct boundary lines in any month other than those specified. *Wilson v. Weller,* 214 S.W.2d 473 (Tex. Civ. App. 1948, no writ). Thus, when in October of 1979 the trial court ordered the submission of a new reapportionment plan by November 13, it was directing petitioners to do that which they were prohibited by state law from doing on their own authority. Although the facts here were identical to those before the Court in *East Carroll Parish,* the Fifth Circuit panel reached a different result. Significantly, the panel made no mention of *East Carroll Parish* in its *per curiam* opinion, although that case was the foundation stone of petitioners' brief.

In *Marshall v. Edwards,* 582 F.2d 927 (5th Cir. 1978), *cert. den.,* 442 U.S. 909, 99 S.Ct. 2820, the trial court had required the parties to submit single member district plans. The police jury and school board employed an expert witness to prepare the plan which they submitted. They did not adopt the plan but merely took the action necessary to submit it to the court, "that is the only thing adopted." 582 F.2d at 933. The panel concluded that *East Carroll Parish* controlled and that the plan was court-ordered, not legislative. It cited as reasons for its con-

clusion (1) that the police jury and school board had not adopted the plan but merely authorized its submission to the court, (2) that the court "seem(ed) to indicate that he saw this as a court-ordered plan," and (3) that the police jury and school board were without authority to reapportion themselves because the only source of such authority was the same statute which the Attorney General had held violative of Section 5 of the Voting Rights Act and which was discussed in footnote 6 in *East Carroll Parish.*

The facts of the instant case are identical in every respect to those in *Marshall v. Edwards,* yet the conclusion reached was different. The panel did not discuss *Marshall v. Edwards,* though it, too, was prominently treated in petitioners' brief.

Morris v. Gressette, supra, is still another opinion of this Court which was cited to but ignored by the panel below. In that case this Court once again made the distinction which the panel below failed to make:

> [R]eapportionment legislation adopted by the Legislature on its own authority in the course of litigation is not effective in a covered jurisdiction until after compliance with § 5's preclearance review provisions. (Such legislation is to be distinguished from a 'reapportionment scheme . . . submitted and adopted pursuant to court order,' for which preclearance is not required. * * *

432 U.S. at 497, 97 S.Ct. at 2416, fn. 8.

The panel below relied solely on the holding of this Court in *Wise v. Lipscomb, supra,* the facts of which are clearly distinguishable. But even applying the reasoning of the various concurring and dissenting opinions in *Wise*

to the facts of the instant case, the conclusion is still inescapable that the plan here is court-ordered and not legislative.

Justices White and Stewart apparently based their conclusion that the plan in *Wise* was legislative on their view that the Dallas City Council had reapportioned itself voluntarily rather than merely submitting the reapportionment plan to the court before adopting it. In the instant case the Kleberg County officials did not adopt the plan for implementation but only "adopted (Nash's) proposal as the plan it would submit to the District Court." (Fifth Circuit's Opinion; Appendix, p. A-27) They likewise placed emphasis on the fact that the Dallas City Council, unlike the *East Carroll* police jury, was not precluded by statute from reapportioning itself. In this respect the instant facts more closely resemble *East Carroll Parish* than *Wise* because the commissioners court was not free to adopt the plan in question.

Mr. Justice Powell joined by the Chief Justice and Justices Blackmun and Rehnquist, in a concurring opinion in *Wise,* stated that the essential consideration which rendered the Dallas City Council's plan legislative was that "the Dallas City Council exercised a legislative judgment, reflecting the policy choices of the elected representatives of the people, rather than a remedial directive of a federal court." ____ U.S. at ____, 98 S.Ct. at 2501. In the instant case it could scarcely be said that a mathematical redistribution of Kleberg County's 1970 census population by a college professor was the exercise of legislative judgment which reflected the policy choices of elected representatives, rather than the remedial directive of a federal court. The trial court

had held that there had been no discrimination or dilution of minority voting strength, but had invalidated the county's existing apportionment because it was not mathematically acceptable. The trial court did not "invite" the submission of a new plan, it "directed" that a plan be prepared and submitted. (District Court's Memorandum and Order of October 2, 1979; Appendix, p. A-19) And it did not leave the matter of whether to implement the plan to the legislative judgment of the county officials, it "ordered" that the 1980 primary and general elections be conducted pursuant thereto. (District Court's Order of January 10, 1980; Appendix, p. A-23) So it would appear that these four justices who concurred in the result reached in *Wise* that the plan there under consideration was legislative because a product of legislative judgment should agree that the plan in the instant case was court-ordered.

Finally, Mr. Justice Marshall, joined by Justices Brennan and Stevens, dissented from the majority judgment in *Wise* on the ground that they saw no distinction between the facts there and those before the court in *East Carroll Parish*. They would have held the plan to be court-ordered, and on the same grounds would undoubtedly consider the instant plan court-ordered, contrary to the holding of the panel below.

Aside from the consideration that the Fifth Circuit's decision does not comport with precedent, there is no historical reason underlying the enactment of the Voting Rights Act for requiring that a plan conceived, submitted, and reviewed as the instant one was be submitted for Section 5 preclearance.

A state does not become subject to Section 5 of the Voting Rights Act until it has been administratively determined that certain conditions which experience has proved are indicative of racial discrimination in voting have existed. *United Jewish Organizations of Williamsburg, Inc. v. Carey,* 430 U.S. 144, 156-157, 97 S.Ct. 996, 1005, 51 L.Ed.2d 229 (1977). The Act is described by this Court as an effort by Congress to thwart "the ingenuity of those bent on preventing Negroes [and now other minorities] from voting." *Allen v. State Board of Elections,* 393 U.S. 544, 548, 89 S.Ct. 817, 823, 22 L.Ed.2d 1 (1969). The provision of Section 5 for preclearance by submission to the Attorney General of the United States "merely gives the covered State a rapid method of rendering a new state election law enforceable." *Id.,* 393 U.S. at 549, 89 S.Ct. at 823. And even though a state has obtained Section 5 preclearance, "private parties may enjoin the enforcement of the new [plan] only in traditional suits attacking its constitutionality." *Id.,* 393 U.S. at 549-550, 89 S.Ct. at 823. See also *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966).

It may be true that a covered state or subdivision thereof which voluntarily embarks upon a new election scheme should be required to demonstrate that the new plan has no adverse effect on minorities who have been the subject of past discrimination. But where, as here, the adoption of a new voting arrangement is not voluntarily undertaken but has been ordered by a trial court; when the governmental entity has not been free to formulate and implement whatever plan may suit its purpose but, instead, has been ordered to submit the plan to a federal district court already familiar with the problems giving rise to

the need for a change in the first instance, and with a ready ability to understand and evaluate the impact of the plan on minorities; and when the plan may not be put into effect until permitted by the federal court, as in the instant case in which the Court retained jurisdiction, no purpose is served in requiring that such a plan be precleared by a federal district court sitting in Washington or by the Attorney General of the United States. Certainly such a procedure is not the "rapid method of rendering a new state election law enforceable" referred to in *Allen, supra,* as compared with review and approval by a district court in which an action to review past voting rights infringements and a remedy thereto is already before the court with the facts fully developed.

If the trial court had merely struck down the current commissioners precinct arrangement in Kleberg County, and had entered a final judgment directing that a new plan be prepared, leaving the matter of preclearance or not to the county, and otherwise washing its hands of the case, it is understandable that a new plan thereafter adopted by the county should be subject to Section 5 preclearance. But that is not the case here. The county was not free to adopt whatever plan it chose. The plan which was prepared at the direction of the trial court was submitted to the trial court and evidence was heard with respect to the equality of population in the four commissioners precincts and with respect to the plantiffs' claim that the new plan adversely affected the voting rights of Mexican-Americans. That issue was resolved against the plantiffs and the plan was ordered implemented. There is no logic or efficiency in requiring a plan which has been thus reviewed by a federal court to be reviewed again by a three-judge court in Washington,

D.C. or by the Attorney General of the United States, depending upon the course chosen by the county officials. This is simply not a fact situation which presents the potential for discrimination against voters to which Section 5 of the Voting Rights Act was directed.

CONCLUSION

For the reasons set forth above, petitioners respectfully pray that a writ of certiorari issue to review and correct the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C.A. NO. C-78-11

JOSE SANCHEZ, ET AL.

v.

W. C. McDANIEL, ET AL.

MEMORANDUM AND ORDER

(Filed October 2, 1979)

This is a class-action suit brought by Plaintiffs Jose Sanchez, Israel Trevino, Natividad de la Rosa, and Santos de la Rosa, seeking injunctive and declaratory relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201-2202. Plaintiffs are seeking to enjoin the future elections for County Commissioners for Kleberg County, Texas, due to the alleged malapportionment of the commissioners' precincts. Plaintiffs also allege that the present apportionment plan for the commissioners' precincts unconstitutionally dilutes the voting power of Mexican-Americans in Kleberg County.

The Defendants are various county officials for Kleberg County, including the county judge, the county commissioners, the county clerk, and the county sheriff. The Democratic and Republican party county chairmen were also originally sued, as was the Texas Secretary of State;

these Defendants, however, were dismissed. Jurisdiction for this suit is based on 28 U.S.C. §§ 1343(3) and 1343 (4).

Class Action

Plaintiffs brought this suit seeking to represent two classes of voters in Kleberg County. Plaintiffs first seek to represent all registered voters in Kleberg County who are denied a vote of equal weight in the election of county commissioners due to the alleged malapportionment of the Commissioners Court precincts. The Court certified this class of voters on June 13, 1978.

Plaintiffs are also seeking to represent all Mexican-American voters in Kleberg County whose voting power has allegedly been diluted under the present apportionment plan. Plaintiffs did not move for certification of this class prior to trial. Nevertheless, both Plaintiffs and Defendants, by post trial briefs, have moved for certification of this class. After reviewing the testimony presented at the trial on the merits, the Court is of the opinion that Plaintiffs have met the requirements under Rule 23(a) and 23(b)(2), Federal Rules of Civil Procedure, to certify the class as all Mexican-American voters in Kleberg County whose voting power has allegedly been diluted under the present apportionment plan for county commissioners.

History of Case

This suit was filed on January 26, 1978, seeking preliminary injunctive relief to enjoin the May, 1978, primary elections for county commissioners. A hearing on Plaintiffs' motion for preliminary injunction was held on February 3, 1978. All parties attended the hearing and

were represented by counsel. The testimony presented by the Plaintiffs was limited solely to their claim of numerical malapportionment. Plaintiffs used the 1978 voter registration list as the statistical base to support their claim of malapportionment. Plaintiffs maintained at the hearing on the preliminary injunction that the voter registration list provided more accurate data of the voting age population than did the 1970 census. Defendants, however, presented evidence which showed that the voter registration list was inaccurate because the names of voters who had moved or who had died had not been removed from the list. This Court denied Plaintiffs' motion for preliminary injunction on February 13, 1978, due to the uncertainty of Plaintiffs' data to provide an accurate statistical base for a claim of malapportionment.

Plaintiffs appealed from the denial of their motion for preliminary injunction. The Court of Appeals for the Fifth Circuit, on August 4, 1978, vacated this Court's decision and remanded the case for reconsideration in light of *Lister v. Commissioners Court,* 566 F.2d 490 (5th Cir. 1978). Trial on the merits was accordingly held on October 30 and 31, 1978.

Background

Kleberg County, Texas, is a unit of state government which was initially created in 1913. Pursuant to state law, the governing body of the county is the Commissioners Court, composed of four commissioners who are presided over by the County Judge. As directed by state law, the county has been divided periodically by the Commissioners Court into four commissioners' precincts. The residents of a given precinct elect a resident of that precinct to the position of county commissioner. Each

commissioner and the County Judge serve a term of four years. Elections are conducted alternatively in the four precincts; two commissioners are elected every two years. The County Judge is elected at-large.

Plaintiffs in this case represent two separate classes of voters. The first class represented by Plaintiffs consists of all registered voters in Kleberg County who are denied a vote of equal weight in the election of county commissioners due to the alleged malapportionment of the Commissioners Court precincts. This claim is a quantitative reapportionment claim. The second class represented by Plaintiffs consists of all Mexican-American voters in Kleberg County whose voting power has allegedly been diluted under the present apportionment plan. This claim is a qualitative reapportionment claim. Due to these separate and distinct claims, the Court will deal with each claim individually in this memorandum.

Quantitative Reapportionment: One Man, One Vote

Lister v. Commissioners Court, supra, involved a suit much like this case brought by Black residents of Navarro County, Texas, against the County Commissioners Court, alleging that the 1969 apportionment plan for Navarro County, "failed to meet population norms and . . . invidiously cancelled, diluted, and minimized the effect of the black vote in Navarro County." 566 F.2d at 491. The Court in *Lister* held that:

> "Regardless of the merits or the demerits of the 1969 plan, the County Commission had a clear duty to reapportion on the basis of the 1970 census, especially since its 1969 plan was not based on the 1960 census."

566 F.2d at 492.

The current apportionment plan for the commissioners' precincts in Kleberg County was implemented on December 9, 1968. The statistical base used for the 1968 reapportionment was the voter registration list for Kleberg County. The commissioners' precincts were not reapportioned following the completion of the 1970 census.

According to the 1970 census, the total population for Kleberg County is 33,166. The ideal precinct, based upon population, would therefore have 8,291 people. Precinct 1, the precinct with the largest population, has a population of of 9,928, or 19.73% more people than the ideal precinct, while Precinct 4, the precinct with the smallest population, has a population of 6,702, or 19.17% less people than the ideal precinct. The maximum deviation from the largest precinct to the smallest precinct is therefore 38.9%, which is well beyond the accepted limits for an apportionment plan approved by a legislative body. *Swann v. Adams,* 385 U.S. 440 (1967); *Ferguson v. Winn Parish Police Jury,* 528 F.2d 592 (5th Cir. 1976).

Defendants must therefore reapportion the current Commissioners Court precincts in order to bring the precincts in line with the one-man, one-vote principle. The 1970 census data should be used as the statistical basis for apportioning the Commissioners Court precincts.

Qualitative Reapportionment: Voting Dilution

The majority of the testimony at the trial on the merits concerned the Plaintiffs' claim of voting dilution. Plaintiffs allege that the present apportionment plan for the commissioners' precincts unconstitutionally dilutes the voting power of Mexican-Americans in Kleberg County.

The Fifth Circuit, in *Nevett v. Sides,* 571 F.2d 209 (1978), held that the Supreme Court's decision in *Washington v. Davis,* 426 U.S. 229 (1976), "requires a showing of intentional discrimination in racially based voting dilution claims founded on the fourteenth amendment." 571 F.2d at 215. While *Nevett v. Sides, supra,* limited its holding to cases involving racial discrimination, 571 F.2d at 218, fn. 11, this Court finds that the standards for judging voting dilution claims stated in *Nevett v. Sides, supra,* and *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973), aff'd on other grounds, *sub. nom., East Carrol Parish School Board v. Marshall,* are also applicable to voting dilution claims of ethnic minorities, as in this case.

The issue in a dilution case is:

> " . . . whether the influence of a given racial group has been distorted because its members have been denied equal access to political processes such as party nominating procedures, registration, and, of course, voting."

Nevett v. Sides, supra, at 216.

A showing of intentional discrimination may be satisfied by either direct or circumstantial evidence. The Plaintiff must show that the plan under attack was either adopted with discriminatory intent, or, that the plan, though neutral when adopted, is maintained because of invidious racial or ethnic considerations. *Nevett v. Sides, supra,* at 221-222.

Plaintiffs in this case present no evidence, either direct or circumstantial, to show that the current apportionment plan was adopted for any discriminatory purpose.

The only evidence that was presented that concerned the enactment of the present apportionment plan was a letter dated June 22, 1967, from County Judge B. A. Brown to all the commissioners, in which Judge Brown stated that the commissioners' precincts needed to be reapportioned in accordance with the "one-man, one-vote principle." (Plaintiffs' Exhibit 1 from Hearing on Preliminary Injunction.) No mention is made of ethnic considerations in Judge Brown's letter. Plaintiffs therefore failed to show that the current apportionment plan for commissioners' precincts was enacted for any discriminatory purpose.

Nor did Plaintiffs present any direct evidence to show that the current apportionment plan is maintained due to discriminatory purposes.

Because no direct evidence of intentional discrimination was shown, this Court must therefore consider Plaintiffs' claim of voter dilution in light of the standards articulated in *Zimmer v. McKeithen, supra,* at 1305, to determine whether, taken "in the aggregate," they point to dilution. *Nevett v. Sides, supra,* at 224.

The primary factors which the Court must consider on the issue of dilution when single-member districts are involved are the group's accessibility to the political process, the responsiveness of representatives to the "particularized interests" of the group, and the effect of past discrimination upon the group's participation in the election system.

Primary Factors

A. *Access to the political process.*

The major thrust of the Plaintiffs' claim of voter dilution concerns the very high percentage population of Mexican-Americans in Precinct 4 which the Plaintiffs con-

tend concentrates the strength of Mexican-Americans in one precinct in order to minimize their strength in other precincts. While the apportionment plans in *Kirksey v. Board of Supervisors,* 554 F.2d 139 (5th Cir.), *cert. denied,* 434 U.S. 968 (1977), and *Robinson v. Commissioners Court,* 505 F.2d 674 (5th Cir. 1974), operated to cancel out minority participation by "slicing up" the minority population, the Plaintiffs claim that the present apportionment scheme for county commissioners' precincts operates to minimize the voting strength of Mexican-Americans in Kleberg County by allegedly concentrating Mexican-American voting strength in one commissioners' precinct. This precinct is Precinct 4, in which the population is 95% Mexican-American.

According to the 1970 census, the ethnic and racial breakdown of the population in Kleberg County is 53% Anglo, 44% Mexican-American, and 3% Black. The population breakdown in each commissioners' precinct by ethnic and racial groups is as follows:

Population by Precincts (1970 Census)

Precinct	*Total Population*	*Mexican-American*	*Anglo*	*Black*
1	9,928	4,002	5,926	-0-
2	9,269	2,865	6,404	-0-
3	7,267	1,337	4,932	998
4	6,702	6,413	288	-0-

Percentage Population by Precinct (1970 Census)

Precinct	*% Mexican-American*	*% Anglo*	*% Black*
1	40.31	59.69	0
2	30.9	69.1	0
3	18.4	68.0	13.6
4	95.7	4.3	0

The breakdown of registered voters by ethnic and racial groups is as follows:

Registered Voters by Precinct
(1978 Voter Registration)

Precinct	*% Mexican-American*	*% Anglo*	*% Black*
1	43.03	56.97	0
2	29.14	70.86	0
3	17.66	79.33	3.01
4	95.72	4.28	0

An examination of the voter registration statistics, when compared with the census data, shows that the percentage of Mexican-Americans in Kleberg County who are registered to vote is almost equal to the percentage of Mexican-Americans living in each precinct. The situation in Kleberg County is therefore different from the situation mentioned by the Court in *Graves v. Barnes,* 343 F. Supp. 704, 733 (W.D. Tex. 1972), aff'd. in part *sub nom., White v. Regester,* 412 U.S. 755 (1973), in which the Court stated that Mexican-Americans in Bexar County register to vote at very low rates, approximately 30%. The high percentage of Mexican-American registered voters in Kleberg County certainly indicates that Mexican-Americans have access to the ballot box in Kleberg County.

Nor are Mexican-Americans denied access to the slating of candidates in Kleberg County. As a factual matter, the Republican Party in Kleberg County has little, if any, voice in the election of candidates to public office. Securing the nomination in the Democratic primary election in Kleberg County is tantamount to election. County Judge McDaniel, who was Democratic Party County Chairman

prior to his election as County Judge, stated that Mexican-Americans in Kleberg County are very active in Democratic Party politics, including nominating procedures. A Mexican-American has been elected Commissioner of Precinct 4 since 1968, when the current apportionment plan under attack by the Plaintiffs was enacted. Prior to 1968, a Mexican-American had never served as a county commissioner.

The current state representative for Kleberg County, Irma Rangel, is a Mexican-American. Ms. Rangel was also the County Democratic Party Chairwoman for Kleberg County prior to being elected state representative. The elected state senator for Kleberg County is also a Mexican-American. In addition to state and county offices, since 1968 Mexican-Americans have served as mayor, city manager, and city commissioners in the City of Kingsville, the county seat for Kleberg County.

Moreover, approximately one-half of the Democratic Party precinct chairmen in Kleberg County are Mexican-Americans. Judge McDaniel also stated that Mexican-Americans and Anglos work together to support the election of Democratic Party candidates on the national, state, and local levels.

Given the voter registration of Mexican-Americans and, more importantly, their participation in the county nominating procedures and county Democratic Party politics, *see, Kirksey v. Board of Supervisors, supra,* fn. 10 at 143, the Court concludes that the Plaintiffs have failed to show that the current apportionment scheme for the Kleberg County Commissioners' precincts denies Mexican-Americans access to the political process.

B. *Responsiveness of the Commissioners' Court to the Particularized Interests of Mexican-Americans*

The second of the primary factors to be considered by the Court is the degree of responsiveness which the Commissioners Court has exhibited toward the particularized interests of the Mexican-American electorate. The Plaintiffs in particular contend that the County Commissioners' selection of sites for county projects and expenditures of funds for such projects has failed to adequately represent the interests of Mexican-Americans. Plaintiffs specifically contend that the County Commissioners have failed to build county buildings and recreational facilities within Precinct 4, the predominantly Mexican-American precinct. In support of this contention, Plaintiffs cite as examples of the unresponsiveness of the Commissioners Court the fact that the county courthouse, county library, Dick Kleberg Park, the Riviera Fishing Pier, the county airport, and the new county hospital are located in precincts other than Precinct 4. After reviewing the evidence, the Court concludes that the County Commissioners had legitimate and nondiscriminatory reasons for locating these county facilities in precincts other than Precinct 4. The Court further finds that the location of these county facilities does not indicate that the County Commissioners Court is unresponsive to the particularized interest of Mexican-Americans.

Both the county courthouse and the county library are located in downtown Kingsville in Precinct 1 near the boundary line between Precincts 1 and 4. Both were built over fifty (50) years ago. The Court fails to see what relationship, if any, the current apportionment plan has to county buildings that were constructed long before the apportionment plan came into existence. The Court

therefore finds that the location of the county courthouse and county library, and the continued expenditure of funds for the maintenance of these buildings, are not indicative of a lack of responsiveness to the particularized interests of Mexican-Americans.

Plaintiffs also contend that the location of Dick Kleberg Park in Precinct 3 indicates the unwillingness of the County Commissioners to locate county facilities in Precinct 4. Dick Kleberg Park is a 200-acre park owned jointly by the City of Kingsville and Kleberg County. The park is located within the Kingsville city limits on land donated by the King Ranch. Testimony at trial showed that Dick Kleberg Perk was not located in Precinct 4 for the same reasons that it was not located within Precincts 1 and 2: the tract of land given to the city and county to build the park was the best site for a park, given its location within the city limits, which made it easily accessible to people in *all* precincts in the county.

While no evidence was presented as to when the land for the park was donated to the city and county, the evidence did show that the park has been developed to provide maximum recreational use to the citizens of Kleberg County. The park has a swimming pool, several baseball fields, tennis courts, a golf course, picnic areas, camping areas, and an Exposition Hall for dances and rodeos. A creek which flows through the park has been dammed for recreational purposes. Judge McDaniel testified that all county Little League teams, with the exception of the Little League teams from the unincorporated town of Riviera, play their games in Dick Kleberg Park. The Riviera Little League has their own baseball park on a 10-acre site in Riviera which the Precinct 3 County

Commissioner was responsible for procuring and developing.

Plaintiffs also point to the location of a county park in Precinct 1 rather than Precinct 4 as an indication of the lack of responsiveness of the County Commissioners to the needs of the people in Precinct 4. Very little testimony was presented concerning this park. Judge McDaniel stated that the United States Navy gave the county 533 acres for the park. No testimony was presented as to what facilities, if any, are located in the park, or to what extent, if any, the county has developed the land for a public park. The testimony is uncertain as to whether this park even has a name. Based upon the meager testimony, the evidence is insufficient for the Court to make any findings of fact concerning the location of this park and the alleged unresponsiveness of the County Commissioners Court.

Plaintiffs also complain about the expenditure of funds for the Riviera Fishing Pier. The pier is located in Precinct 3 and is a public fishing pier located on Baffin Bay. Precinct 3 is the only precinct in the county with public access to salt water recreation. The Court finds that the expenditure of funds for a public salt water fishing pier, located in the only precinct with public access to Baffin Bay or the Laguna Madre, is not an indication of unresponsiveness of the County Commissioners to the particularized interest of Mexican-Americans.

The location of the county airport in Precinct 2 rather than Precinct 4 was also presented as evidence of the Commissioners' unresponsiveness to the needs of Mexican-Americans. The testimony showed that the county airport was located in Precinct 2 because it was the only

site approved by the Federal Aviation Administration due to the location of the Naval Air Station in Kleberg County. The Court therefore finds that this argument by the Plaintiffs is without merit.

Plaintiffs also feel that the new Kleberg County Hospital should have been located in Precinct 4. Judge McDaniel testified that the Commissioners Court viewed five possible sites, one of which was in Precinct 4, and concluded that the site in Precinct 1 which was offered by the Otis West family and the King Ranch was the best site for the new hospital. Judge McDaniel stated that the site selected for the hospital is directly accessible to emergency vehicles coming from all parts of the county. Judge McDaniel also stated that one of the problems with the old hospital was that it was located near a residential section which restricted expansion of the hospital and created complaints about inadequate parking and crowded conditions. The new hospital site therefore was selected to obviate these problems; it is located in an area away from residential sections in order to allow for future expansion.

Plaintiffs point to the fact that Mr. Fil Garcia and the Kleberg County League of United Latin American Citizens (LULAC) offered the county two 15-acre sites in Precinct 4 on which to build the county hospital. The testimony showed, however, that these two tracts of land were not offered to the county until *after* the Commissioners Court had accepted the offer by the Otis West family and the King Ranch to donate a 10-acre tract of land in Precinct 1 for the county hospital. More importantly, Mr. Fil Garcia admitted on cross-examination that in his opinion the site on which the new hos-

pital will be located was a better location for the hospital than the sites offered by his family and LULAC.

Plaintiffs also feel that the Commissioners Court is unresponsive to the needs of the citizens of Riviera, Texas, which is an unincorporated town located in Precinct 3 of Kleberg County, in failing to provide adequate water drainage. Plaintiffs at trial particularly complained of flooding that occurred in 1977 when it rained 24 inches in 24 hours, with 18 inches falling in a 4-hour period. (See Plaintiffs' Exhibits 59-69). While Judge McDaniel did acknowledge that a drainage problem did exist in Riviera, certainly no drainage system would be able to withstand 24 inches of rain in a 24-hour period. The testimony also showed that Commissioner Hubert, the County Commissioner for Precinct 3, *personally* helped evacuate families threatened by the flood and established facilities in a local school where the flood victims could stay until the flood waters had subsided. Such conduct on the part of Commissioner Hubert certainly indicates that he is responsive to the needs of the citizens in his precinct.

Testimony also showed that Commissioner Hubert had talked to then Governor Dolph Briscoe concerning the drainage problem. Governor Briscoe arranged a meeting between Commissioner Hubert and the Highway Department to see if Kleberg County and the Highway Department could work together to alleviate the drainage problem in Riviera. The Highway Department, however, turned down Commissioner Hubert's proposal allowing the county to construct a drainage ditch in the median of U.S. Highway 77.

In spite of the efforts by Commissioner Hubert to remedy the acknowledged drainage problems in Riviera, the

fact remains that the County Commissioners have still failed to remedy the poor drainage in Riviera. Nevertheless, while Mexican-Americans in Riviera have a very legitimate concern about the drainage problems, that concern is shared by Anglos in Riviera as well. The failure of the County Commissioners to remedy this condition cannot therefore be due to the failure of the Commissioners to be responsive to the *particularized interests* of Mexican-Americans.

After considering all the specific complaints raised by the Plaintiffs, the Court concludes that the Plaintiffs have not met their burden of proof of showing that the County Commissioners are unresponsive to the particularized interest of the Mexican-American community in Kleberg County. The County Commissioners were able to point to specific and legitimate nondiscriminatory reasons explaining why the county facilities in question were not located in Precinct 4.

C. *Effects of Past Discrimination on Access to the Election System*

The final task for the Court in considering the *Zimmer* primary factors is to make a determination of whether or not the existence of past discrimination in general precludes the effective participation in the election system today.

Although the poll tax undoubtedly discriminated against minorities, it was declared unconstitutional in Texas in 1966. *See, United States v. State of Texas,* 252 F. Supp. 234 (W.D. Tex. 1966), affm'd., 384 U.S.. 155 (1966). The past practice of restrictive covenants excluding certain ethnic groups from neighborhoods has been unenforceable since 1948. *See, Shelly v. Kraemer,* 334 U.S. 1 (1948).

This Court is not so naive as to believe that all discrimination by all the citizens in Kleberg County has been eliminated. Indeed, Plaintiffs presented testimony concerning a meeting that occurred during the 1974 Kingsville City Commissioners race in which some unidentified businessmen called a meeting in an attempt to get Anglo candidates to withdraw from the race to prevent a splitting of the Anglo vote. The evidence also showed, however, that none of the Anglo candidates withdrew from the race, that the meeting was denounced in the local press by both Anglos and Mexican-Americans, and that the Anglo candidates supported by the group who called the meeting did not win the election.

The issue to be determined in this case is not whether discrimination existed in the past, but whether or not the history of discrimination *precludes effective participation in the election process today*.

The evidence presented at trial showed that while no Mexican-American had ever served as a County Commissioner prior to 1968, a Mexican-American has always been elected County Commissioner for Precinct 4 since the enactment of the current apportionment plan under attack by the Plaintiffs. Mexican-Americans actively participate in the slating and election processes in Kleberg County for national, state, county, and city offices. Mexican-Americans in Kleberg County have been appointed to positions of authority on the Kleberg County Hospital Board, the Kingsville-Kleberg County Health Board, the Kingsville-Kleberg County Park Board, and the Kingsville-Kleberg County Library Board. In short, Mexican-Americans are able to participate in all phases of the political process in Kleberg County.

Even though there has been discrimination against Mexican-Americans in the past, the Court concludes that the current apportionment plan does not preclude Mexican-Americans from effectively participating in the election system today.

Enhancing Factors

The Fifth Circuit, in *Nevett v. Sides, supra,* directed district courts to also make specific findings with regard to the enhancing factors enumerated in *Zimmer v. McKeithen, supra.* However, *Zimmer v. McKeithen* and *Nevett v. Sides* both involved voting dilution claims of multi-member districts. The *Zimmer* enhancement criteria of (1) the existence of large districts, (2) majority vote requirements, (3) anti-single shot voting provisions, and (4) the lack of provision for at-large candidates running from particular geographical subdistricts are not relevant in voting dilution cases involving single-member districts. *See, Blacks United, Etc. v. City of Shreveport,* 571 F.2d 248, 255, fn. 6 (5th Cir. 1978).

Conclusion

The Court finds that the present apportionment plan for the election of the County Commissioners violates the one-man, one-vote principle and is therefore unconstitutional. The Court also finds that the Plaintiffs have failed to meet their burden of proof in their voting dilution claim on all of the applicable *Zimmer* criteria. The Court therefore concludes that an aggregate of the *Zimmer* criteria preponderates in favor of the Defendants.

The Defendants, nevertheless, will have to reapportion the County Commissioners precincts based upon the 1970

census in order to insure adherence to the one-man, one-vote principle.

The initial burden of fashioning a constitutionally permissible remedy is on the County Commissioners Court. The Supreme Court of the United States has recently written,

> When a federal court declares an existing apportionment scheme unconstitutional, it is . . . appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new . . . plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution. *Wise v. Lipscomb,* 437 U.S. 535 (1978).

If the Commissioners Court is unwilling or unable to present a proposed plan that will pass constitutional muster, it will then become the "unwelcome obligation" of the Court to do so. *Connor v. Finch,* 431 U.S. 407, 415.

With that in mind, the Defendants are hereby directed to submit a proposed new plan by the 13th day of November, 1979. The Court shall hold a hearing on the 10th day of December, 1979, to determine the validity of the proposed new plan, at 9:00 a.m.

Costs are hereby taxed against the Defendants. Plaintiffs are herby awarded reasonable attorney's fees. A hearing on attorney's fees will be set by the Court at a later time.

IT IS SO ORDERED.

SIGNED this 2nd day of October, 1979.

/s/ OWEN D. COX
United States District Judge

APPENDIX B

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C.A. NO. C-78-11

JOSE SANCHEZ, ET AL.

v.

W. C. McDANIEL, ET AL.

ORDER

(Filed January 10, 1980)

This suit was brought by Plaintiffs, who are Mexican-American residents of Kleberg County, Texas; and this Court has certified it as a class action.

Plaintiffs complain that the current Commissioners' Court election precincts in Kleberg County, as they now exist, violate the one-man, one-vote principle. By its Memorandum and Order dated October 2, 1979, this Court concluded that the present apportionment plan for the election of the County Commissioners in that county violates the one-man, one-vote principle and is therefore unconstitutional.

Plaintiffs also allege that the Commissioners' Court precincts were drawn to dilute the voting strength of Mexican-Americans in Kleberg County. After a trial on the merits, the Court found that the apportionment plan for the Commissioners' Court precincts did indeed violate the one-man, one-vote principle and ordered the Com-

missioners' Court to submit a new apportionment plan to be presented to the Court for its review. The Court also found that the Plaintiffs failed to meet their burden of proof under *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973), aff'd. on other grounds *sub nom, East Carroll Parish School Board v. Marshall,* 424 U.S. 636 (1976), to establish their voting dilution claim.

On December 10, 1979, the Court heard the Plaintiffs' objections to the proposed reapportionment plan submitted by the Defendants. At the hearing, the Plaintiffs did not object to the proposed plan on the basis that it did not comply with the one-man, one-vote principle, but instead objected to the plan because it had not been pre-cleared under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The Plaintiffs orally moved this Court to enjoin the 1980 primary elections until the proposed plan was pre-cleared under § 5, and subsequently moved by written motion for a preliminary injunction. Briefs in support of said motion were filed on December 17, 1979.

The Court has reviewed the proposed reapportionment plan submitted by the Defendants and has considered the Plaintiffs' objections to it. Subsequent to such review, this Court concluded that the proposed plan complies with the one-man, one-vote principle and should therefore be implemented for the purpose of conducting the 1980 elections. Also, it is the opinion of the Court that the proposed plan is a court-ordered plan rather than a court-adopted plan and therefore is not subject to pre-clearance provisions of the Voting Rights Act.

The Supreme Court has explicitly held that, "A decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act." *Connor v. Johnson,*

402 U.S. 690, 691 (1971). In *East Carroll Parish School Board v. Marshall,* 424 U.S. 636 (1976), the Supreme Court stated that:

> "In any event, we agree with the [Fifth Circuit] Court of Appeals, *Zimmer v. McKeithen,* 467 F.2d at 1383, 485 F.2d at 1302, n. 9, that court-ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by § 5. Had the East Carroll police jury reapportioned itself on its own authority, clearance under § 5 of the Voting Rights Act would clearly have been required."

424 U.S. at 638-639, n. 6.

The Kleberg County Commissioners' Court did not reapportion the Commissioners' Court precincts on their own authority, but instead did so in response to a court order. While the Court is aware of the conflicting opinions of the Fifth Circuit concerning the need for preclearance in cases similar to this case, *compare Zimmer v. McKeithen,* 485 F.2d 1297, 1302, n. 9 (5th Cir. 1973) (*en banc*), with *Calderon v. McGee,* 584 F.2d 66 (5th Cir. 1978), on motion for rehearing, 589 F.2d 909 (1979), the Court is of the opinion that the reaportionment plan at issue is not subject to the pre-clearance provisions of § 5 of the Voting Rights Act.

The reapportionment plan submitted to the Court by the Defendants is therefore approved for the 1980 elections. The 1980 primary and general elections should be conducted under this plan.

IT IS SO ORDERED.

SIGNED this 10th day of January, 1980.

/s/ OWEN D. COX
United States District Judge

APPENDIX C

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C.A. NO. C-78-11

JOSE SANCHEZ, ET AL.

v.

W. C. McDANIEL, ET AL.

ORDER

(Filed January 29, 1980)

On January 14, 1980, the Court filed an order implementing a new apportionment plan for the 1980 elections for the election of the County Commissioners for Kleberg County. Plaintiffs filed a notice of appeal from this order on January 23, 1980, along with several other motions, including a motion for reconsideration and motion to convene a three-judge panel.

Once a notice of appeal is filed, jurisdiction over the case passes from the District Court to the Court of Appeals. This Court therefore does not have jurisdiction to rule on Plaintiffs' motion for reconsideration and motion to convene a three-judge panel.

Plaintiffs also filed a motion for injunction pending appeal at the same time that they filed their notice of appeal. This Court does have jurisdiction to rule on the motion for injunction pending appeal. Nevertheless, after

considering such motion, the Court is of the opinion that it should be, and hereby is, denied.

IT IS SO ORDERED.

SIGNED this 29th day of January, 1980.

/s/ OWEN D. COX
United States District Judge

APPENDIX D

(615 F.2d 1023)

Jose SANCHEZ et al.,
Plaintiffs-Appellants,

v.

W. C. McDANIEL et al.,
Defendants-Appellees.

No. 80-1108.

United States Court of Appeals,
Fifth Circuit.

April 14, 1980.

Appeal from the United States District Court for the Southern District of Texas.

Before CHARLES CLARK, VANCE, and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

This action is before us on the appellants' motions for summary reversal or, in the alternative, an injunction pending appeal. The judgment of the district court is vacated and this action is remanded to the district court for further proceedings consistent herewith.[1]

The district court determined that the 1968 Kleberg County, Texas, apportionment plan violated the constitutional principle of one man, one vote. It directed the appellees to submit a proposed reapportionment plan by

1. It is appropriate to dispose of this case summarily. See *Groendyke Transportation, Inc. v. Davis*, 5 Cir., 1969, 406 F.2d 1158.

November 13, 1979. In response to the district court's order, the Kleberg County Commissioners' Court employed Dr. Robert T. Nash to prepare a reapportionment plan. The Commissioner's Court reviewed Dr. Nash's work and officially adopted his proposal as the plan it would submit to the district court.

The district court held a hearing on December 10, 1979, to determine the validity of the proposed reapportionment plan. In an order dated January 10, 1980, the district court rejected the appellants' objections to the proposed reapportionment plan, approving its use for the 1980 primary and general elections. In so doing, the court reasoned that, because the "Kleberg County Commissioners' Court did not reapportion the Commissioners' Court precincts on their own authority, but instead did so in response to a court order," the reapportionment plan "is a court-ordered plan rather than a court-adopted plan and therefore is not subject to [the] pre-clearance provisions of the Voting Rights Act." We disagree.

The United States Supreme Court in *Wise v. Lipscomb*, 437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978), considered the relationship between court-ordered reapportionment plans and legislative reapportionment plans. The Court recognized that the reapportionment of legislative bodies is the responsibility of the legislature, stating that it is only "when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, [that] it becomes the 'unwelcome obligation' . . . of the federal court to devise and impose a reapportionment plan pending later legislative action." *Id.* at 540, 98 S.Ct. at 2497, 57 L. Ed2d at 417. It recognized that

> [w]hen a federal court declares an existing apportionment scheme unconstitutional, it is . . . appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new *legislative* plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution.

Id. (Emphasis added.)

A proposed reapportionment plan submitted by a local legislative body does not lose its status as a legislative rather than court-ordered plan merely because it is the product of litigation conducted in a federal forum. As the Supreme Court stated, "[a] new reapportionment plan enacted by a State, including one purportedly adopted in response to invalidation of the prior plan by a federal court will not be considered 'effective as law,' . . . until it has been submitted and has received clearance under § 5 [of the Voting Rights Act of 1965]." *Id.* at 542, 98 S.Ct. at 2498, 57 L.Ed.2d at 418. By submitting a proposed reapportionment plan to the district court, the Kleberg County Commissioners' Court complied with and fulfilled its legislative responsibility. *See Id.* at 546, 98 S.Ct. at 2500, 57 L.Ed.2d at 421. The proposed legislative plan is subject to the preclearance provisions of § 5 of the Voting Rights Act of 1965. Accordingly, the district court erred in considering the constitutionality of the proposed plan.

We are aware that the Kleberg County Commissioners' primary election presently is scheduled for May, 1980.

On remand, the district court may, on appropriate motion, enter such relief as is necessary and appropriate.

Because of our disposition of this action, we pretermit deciding and intimate no opinion as to the validity of the proposed reapportionment plan.

VACATED and REMANDED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Office of the Clerk

Gilbert F. Ganucheau
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

April 25, 1980

Mr. Jesse E. Clark, Clerk
U. S. District Court
P. O. Box 2567
Corpus Christi, TX 78403

NO. 80-1108—JOSE SANCHEZ, ET AL. v.
W. C. McDANIEL, ET AL.
(D. C. No. CA-C78-11)

Dear Mr. Clark:

The Court has directed that the mandate be issued this day in the above referenced case. Therefore, enclosed is a certified copy of the opinion and judgment of this Court issued as and for the mandate.

Returned, under separate cover, is the box of exhibits filed in this case.

Please acknowledge receipt on the attached copy of this letter.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

By: Brenda Houck
Deputy Clerk

/bh
enclosure
cc: Mr. Bob Parmley
Mr. Richard A. Hall

APPENDIX F

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C. A. No. C-78-11

JOSE SANCHEZ, ET AL.

v.

W. C. McDANIEL, ET AL.

ORDER

(Filed April 30, 1980)

On April 30, 1980, this case was called for a hearing on Plaintiff's motion for temporary injunction. Having considered the testimony presented, the arguments of counsel, and the equities in the present case, the Court has concluded that it should not enjoin the May 3, 1980, primary election in Kleberg County.

At the hearing on Plaintiff's motion, Kleberg County Judge W. C. McDaniel testified that the names of the candidates running for the two County Commissioner positions and for the three Constable positions up for election this year have already been programmed into the voting machines scheduled to be used in the May 3rd primary in Kleberg County. Judge McDaniel further testified that the names of those candidates could not be deleted from the voting machines in time for the primary election because it would take at least ten days to do so. Were the Court, on election eve, to enjoin the County Commissioner and Constable primary elections, it would

engender confusion among the electorate and hamper the election officers' task of conducting the primary for other Kleberg County offices in an orderly and efficient manner.

The Court further notes that this is a primary, not a general, election and therefore it will not work a change in the composition of the County Commissioners Court nor will it result in the election of new Constables in Precincts 1, 3 and 4. Permitting this primary election to go forth cannot, therefore, abridge or dilute anyone's voting rights in Kleberg County, and the Plaintiffs will suffer no irreparable harm if the primary election is held in Kleberg County.

For the foregoing reasons, the Court is of the opinion that the May 3, 1980, primary election in Kleberg County should not be enjoined. Plaintiffs' motion for temporary injunction is hereby denied.

The Court is of the opinion, however, that the results of the primary election for the offices of County Commissioner in Precincts 1 and 3, and for Constable in Precincts 1, 3 and 4, should not be announced by the Kleberg County Clerk following the tabulation of the votes.

It is therefore ORDERED that the Kleberg County Clerk is hereby enjoined from announcing the winning candidates of the May 3rd primary election for County Commissioner in Precincts 1 and 3, and for Constable in Precincts 1, 3 and 4, until further order of this Court.

IT IS SO ORDERED.

SIGNED this 30th day of April, 1980.

/s/ OWEN D. COX
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk
Gilbert F. Ganucheau
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

May 12, 1980

TO ALL PARTIES LISTED BELOW:

No. 80-1108—JOSE SANCHEZ, ET AL, v.
W. C. McDANIEL, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

By: SALLY HAYWARD
Deputy Clerk

cc: Mr. Bob Parmley
Mr. Richard A. Hall

APPENDIX H

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C. A. NO. C-78-11

JOSE SANCHEZ, ET AL.

v.

W. C. McDANIEL, ET AL.

ORDER

In its order of April 14, 1980, the Fifth Circuit Court of Appeals, in Cause No. 80-1108, held that the reapportionment plan for the commissioners precincts in Kleberg County, Texas, which had been previously ordered into effect by this Court, was not a court-ordered plan. Thus, preclearance pursuant to Section 5 of the Voting Rights Act of 1968, as amended, is required. This was made clear when the Defendants' recent motion for rehearing before said Court of Appeals *en banc* was denied on May 12, 1980.

On June 16, 1980, a hearing was held on Plaintiffs' motion to require the Defendants to begin the Section 5 preclearance procedure, and at the conclusion of said hearing the Court took the matter under advisement.

The Court having considered Plaintiff's motion is now of the opinion that it should be granted.

This Court does now order that Defendants immediately begin the Section 5 preclearance procedure in the best interest of justice and judicial economy and there is

no valid reason for further delay in commencing the Section 5 preclearance procedure.

It is therefore ORDERED that the Defendants immediately begin the Section 5 preclearance pursuant to 42 U.S.C. § 1973c.

SIGNED this 20th day of June, 1980.

/s/ OWEN D. COX
United States District Judge

CERTIFICATE OF SERVICE

This is to certify that on August _____, 1980, three copies of the foregoing Petition for Writ of Certiorari and Appendix were served upon respondents by depositing the same in the United States Post Office, first-class postage prepaid, properly addressed to Mr. Bob Parmley, Texas Rural Legal Aid, Inc., 504 Sidney Baker Street, Kerrville, Texas 78028, their attorney.

RICHARD A. HALL

NO. 80-180

IN THE

Supreme Court of the United States

October Term, 1980

W. C. McDANIEL, ET AL.,
Petitioners

v.

JOSE SANCHEZ, ET AL.,
Respondents

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

JOINT APPENDIX

RICHARD A. HALL
GARY, THOMASSON, HALL & MARKS
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Counsel for Petitioners

ROBERT J. PARMLEY
DAVID G. HALL
TEXAS RURAL LEGAL AID, INC.
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Kerrville, Texas 78028
(512) 896-4316

Counsel for Respondents

Petition for Certiorari filed August 6, 1980.

Certiorari granted October 14, 1980.

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A. Items Reproduced In This Appendix:

(1) Relevant docket entries 1

(2) Transcript of December 10, 1979 hearing on the new county reapportionment plan prepared in response to trial court's order of October 2, 1979 .. 9

(3) Plaintiffs' Exhibit 1, December 10, 1979 hearing.. 77

(4) Plaintiff's Exhibit 2, December 10, 1979 hearing.. 78

B. Relevant opinions and orders reproduced at the indicated pages of the Petition For Writ Of Certiorari:

(1) The District Court's Memorandum and Order of October 2, 1979 finding a constitutionally impermissible numerical disparity between the four Kleberg County Commissioners precincts but finding no dilution of Mexican-American voting strength, and ordering that a new plan be prepared. A-1

(2) The District Court's Order, dated January 10, 1980, declaring the new reapportionment plan to be constitutionally acceptable, finding that the plan was court-ordered rather than legislative such that preclearance under Section 5 of the Voting Rights Act (42 U.S.C. 1973(c)) was not required, and directing that the 1980 primary and general elections be conducted thereunder. A-21

(3) The District Court's Order of January 29, 1980 noting that the Court had "filed an order implementing a new apportionment plan for the 1980 elections" and denying respondents' motion for injunction pending appeal. A-24

(4) Opinion Order of the United States Court of Appeals for the Fifth Circuit, dated April 14, 1980, declaring that because Kleberg County's reapportionment plan had not been precleared under Section 5 of the Voting Rights Act, the trial court erred in assessing the plan's constitutionality and in ordering it into effect. Reported at 615 F.2d 1023. ..... A-26

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(5) Notification from the Clerk of the United States Court of Appeals for the Fifth Circuit, dated April 25th, 1980, of the issuance on that date of the Court's Mandate. A-30

(6) Order of the District Court, dated April 30, 1980, denying respondents' motion to enjoin the conduct of the May 3, 1980 primary election of county commissioners in Kleberg County. A-31

(7) Letter from the Clerk of the United States Court of Appeals for the Fifth Circuit, dated May 12, 1980, advising that on that date petitioners' motion for rehearing and for rehearing en banc had been denied. A-33

(8) District Court's Order, dated June 20, 1980, directing petitioners to immediately begin Section 5 preclearance procedure with respect to the plan for reapportionment of the commissioners precincts of Kleberg County. A-34

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C.A. No. C-78-11

JOSE SANCHEZ, ET AL.,
Plaintiffs

v.

W. C. McDANIEL, ET AL.,
Defendants

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1/26/78	1.	Complaint, filed. *CLASS ACTION*—(copy to the Attorney General of Texas, Governor of Texas/ns)
1/26/78	2.	Plaintiff's Motion for Preliminary Injunction, filed.
		* * * *
2/3/78		*HEARING on Plaintiffs' Motion for* Preliminary Injunction, entered. (ODC) Case called for hearing on Pltff's Motion for a Preliminary Injunction. Attys. present. Mr. Parmley, L. Javier Cavazos, Richard Hall, Nelson Sharpe and L. L. Villarreal. Statements of counsel. Pltffs. witnesses.

DATE	NR.	PROCEEDINGS
		Pltffs. rest. Defendants rest. Arguments of Counsel. Court denied Plaintiffs' Motion for Preliminary Injunction and set the case for *Docket call at 9:30 a.m. MARCH 27, 1978.* Hearing concluded.
		* * * *
2/9/78	23.	DEFENDANTS McDaniel, Diaz, Collins, Hubert Dreyer, Ware & Scarbrough's ANSWER, filed.
		* * * *
2/10/78	28.	Plaintiffs' Motion for withdrawal of appearance of Plaintiffs Daniel Garcia & Englantina Garcia, filed.
2/16/78	29.	MEMORANDUM AND ORDER, filed. (ODC) (a/n-ns) Motion for preliminary injunction is denied. Case is set for docket call on the 27th of March, 1978 at 9:30 a.m.
		* * * *
3/3/78	32.	Plaintiffs' Notice of appeal, filed. (Copy to Ct. of Appeals. /ns)
		* * * *
3/7/78	36.	ORDER denying Plaintiff's Motion for Injunction pending appeal, filed. (ODC) (a/n by copy /ns)
3/9/78	37.	ORDER granting Motion to dismiss of plaintiffs Daniel Garcia & Englantina Garcia, filed. (ODC) (a/n by copy /ns)
		* * * *

DATE	NR.	PROCEEDINGS
4/10/78	49.	C/copy of Judgment from Court of Appeals denying appellant's Motion for an expedited appeal & denying appellant's petition for injunction, pending appeal, filed. (Goldberg & Ainsworth)
		* * * *
6/13/78	53.	ORDER certifying Class Action, filed. (ODC) (a/n by copy /ns)
		* * * *
7/20/78	55.	Plaintiff's First Amended & Supplemental Complaint, filed.
		* * * *
8/8/78	57.	C/Copy of Order from Ct. of Appeals ordering that the appeal in this case is expedited and the Judgment of the District Court is *vacated* and *remanded* to the District Court for consideration of Injunctive and other appropriate relief, filed. (Judges Goldberg & Ainsworth)
		* * * *
10/30/78		*First day of Trial, entered. (ODC)* (BS) All attorneys present. Bob Parmley & M. Levine for Pltff. Hall for Deft. Case called for trial. Both sides announced ready. Plaintiff waived opening statement and offered into evidence all testimony and exhibits introduced at the prior Hearing. Plaintiff's witnesses. Trial not concluded. Court recessed until 9:00 a.m. October 31, 1978.

DATE	NR.	PROCEEDINGS
10/31/78		*Second day of trial, entered. (ODC)* (BS) Trial resumed before the court. Plaintiff's witnesses. Plaintiff rests. Defendant's witness. Defendant rests. Court granted deft. permission to re-open. Defendants' witness. Court directed Plaintiff and Defendant to file suggested Findings of Fact and Conclusions of Law on or before November 20, 1978. Trial concluded.
		* * * *
10/2/79	78.	MEMORANDUM & ORDER, filed. (ODC) Court certifies this to be a Class Action, having met the requirements under Rule 23(a)(b)(2). Court further finds that the present apportionment Plan for election of County Commissioners is unconstitutional. Defts. are directed to submit a new Proposed Plan by NOVEMBER 13, 1979, A *Hearing is set for DECEMBER 10, 1979 AT 9:00 A.M.* to determine validity of Proposed New Plan. Costs are taxed to defts. and Plaintiffs are awarded attorneys fees. A Hearing on attys. fees will be set at a later date. (a/n by copy /ns)
		* * * *
12/10/79		*HEARING held. (ODC) (PCC)* Hearing began before the Court to determine the validity of a proposed new Plan. Defendants' witnesses. Deft. rests. Plaintiff's witnesses. Plaintiff

DATE	NR.	PROCEEDINGS
		rests. Closing arguments. Court took matter under advisement. Hearing concluded.
		* * * *
12/17/79	81.	Memorandum of Points & Authorities in support of Plaintiff's request that the defendants' Plan be accepted contingent upon Sec. 5 preclearance with the issuance of an Injunction pending preclearance filed.
12/18/79	82.	Defendants' Brief in support of proposition that reapportionment Plan, if ordered into effect by the Court is a Court-ordered Plan rather than a Legislative Plan.
1/14/80	83.	ORDER Approving Reapportionment Plan submitted to Court for 1980 elections, filed. (ODC) 1980 Primary and General Elections should be Conducted under this plan. (a/n by copy /ns)
1/23/80	84.	Plaintiff's Motion for Injunction pending appeal from an Adverse decision filed on Jan. 14, 1980, filed.
		* * * *
1/23/80	86.	Plaintiff's Motion for convening a Three Judge Panel to review the applicability of Sec. 5 of the Voting Rights Act to the instant case, filed.
		* * * *
1/23/80	88.	Plaintiff's Notice of Appeal, filed.
		* * * *

DATE	NR.	PROCEEDINGS
1/29/80	90.	ORDER denying Plaintiff's Motion for injunction pending appeal, filed. (ODC) Court further rules that once a Notice of appeal is filed, jurisdiction over the case passes from the District Court to the Court of Appeals, therefore, this Court does not have jurisdiction to rule on Plaintiff's Motion for reconsideration & Motion to convene a Three-Judge Panel. (a/n by copy & Ct. of Appeals)
		* * * *
4/25/80	95.	Plaintiff's Motion for Temporary Injunction, filed.
4/28/80	96.	ORDER setting Hearing on Plaintiff's Motion for Temp. Injunction, filed. (ODC) Hearing on Pltff's Motion for Temp. Injunc., is set for APRIL 30, 1980 at 1:30 p.m. (a/n by telephone & by copy /ns/sa)
		* * * *
4/30/80		*HEARING in re; Plaintiff's Motion for Temporary Injunction. (ODC) (pcc)* Hearing began before the Court on Plaintiff's Motion for Temporary Injunction. Plaintiff stated they would rely on the testimony from the December 10, 1979 Hearing and also the Ruling from the 5th Circuit. Deft's Witnesses. Deft. rests. Arguments of Counsel. Court took matter under advisement. Hearing concluded.

DATE	NR.	PROCEEDINGS
4/30/80	99.	ORDER, filed. (ODC) Court concludes it should not enjoin the May 3, 1980 Primary election in Kleberg County. Plaintiff's Motion for temporary injunction is denied. Court orders that the Kleberg County Clerk is enjoined from announcing the winning candidates of the May 3rd primary election for County Commissioner in Precincts 1 & 3, and for Constable in Precincts 1, 3, & 4 until further order of this Court. (a/n by copy /ns)
5/13/80	100.	Plaintiff's Motion to require the defendants to begin the Section 5 Preclearance Procedure, filed.
		* * * *
6/16/80		*HEARING ON PLTFF'S MOTION TO REQUIRE DEFTS. TO BEGIN PRECLEARANCE PROCEDURES (ODC/pcc)* Case called for hearing on Pltff's Motion to Require Defts. to begin Section 5 preclearance procedure. Arguments of Counsel. Deft's witnesses. Both sides close. Arguments of Counsel. Court took matter under advisement. Hearing concluded.
6/20/80	105.	ORDER Requiring Defts to immediately begin Section 5 Preclearance Pursuant to 42 USC 1973c, filed. (ODC) (a/n by copy /sm)
		* * * *

DATE	NR.	PROCEEDINGS
9/24/80	113.	Defendant's Motion for Leave to include candidates' names on November 4 General Election Ballot, filed.
9/25/80	114.	ORDER granting Defendant's Motion for Leave to include candidates' names on November 4 General Election Ballot, filed. (ODC) Further ordered that if the Supreme Court denies deft's petition for Writ of Certiorari, then the results of the 1980 general election shall be void & of no force Or effect with respect to the election of commissioners of Precincts 1 & 3. (a/n by copy /ns)
9/26/80	115.	Defendant's Motion for Leave to Include Candidates for Constable on November 4 General Election Ballot, filed.
9/30/80	116.	ORDER granting Defendant's Motion for Leave to include candidates' names on November 4 General Election Ballot, filed. (ODC) Further ordered that if the Supreme Court denies deft's petition for Writ of Certiorari, then the results of the 1980 general election shall be void & of no force or effect with respect to the election of constable for Kleberg County. (a/n by copy /ns)

* * * *

[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C.A. No. C-78-11

JOSE SANCHEZ, et al

vs.

W. C. McDANIEL, Ind. and in his official capacity as Kleberg County Judge, et al

REPORTER'S TRANSCRIPT OF PROCEEDINGS

* * * *

[2]

DECEMBER 10, 1979—MORNING SESSION

BEFORE: Honorable Owen D. Cox, Judge Presiding

THE COURT: The Court calls Civil Action 78-11, Jose Sanchez, et al, against W. C. McDaniel, Individually and in his official capacity as Kleberg County Judge and other members of the county officials.

This matter is called for a hearing to determine the validity of a proposed new plan that has been promulgated by the county officials with regard to the Kleberg County Commissioners' Court, precinct boundaries, and this involves a question of equal representation.

I assume, Mr. Hall, that you are the moving parties at this time.

MR. HALL: Yes, Your Honor. We have submitted to the Court a proposal for the reapportionment of the four commissioners' precincts and we have provided a copy, at the time we filed with the Court, we provided a

[3]

copy of the same information to Mr. Parmley and he has had an opportunity, I believe he told me, to review the figures and compare them with his own copy of the 1970 census.

We are prepared simply to offer some proof, if necessary, as to the methods by which the reapportionment was made, if the Court would like us to do so.

THE COURT: Mr. Parmley, I would like to hear from you at this time.

MR. PARMLEY: Your Honor, prior to starting the hearing, I would request that the Court clarify whether or not the purpose of this hearing is solely to examine the one-person/one-vote violations or whether it is also to examine the dilution of minority voting strength. Of course our position that the issue of dilution of minority voting strength has been vested solely in the Justice Department and the United States District Court sitting in Washington, D.C., pursuant to the Voting Rights Act of 1968.

THE COURT: Well, as I understood it, and the intention that the Court has at this time is just a hearing for determination of validity

[4]

of a new plan that has been developed.

MR. HALL: Your Honor, that is what we came prepared for and I don't agree with Mr. Parmley. This was a lawsuit which was filed in federal court alleging two causes of action. One was that there had been an unconstitutional dilution of the voting strength of certain minority residents of Kleberg County and the other was a claim for a reapportionment simply based on one-man/one-vote. We tried both issues on the merits. The Court found adversely to the Plaintiffs on the question of dilution of voting strength and that left only the question of a division or a reapportionment on the basis of one-man/one-vote. I do not agree that under those circumstances the United States Justice Department has exclusive jurisdiction over the question of dilution of voting strength, and so we have come only on the one-man/one-vote, which is what the Court ordered us to do.

THE COURT: Mr. Parmley.

MR. PARMLEY: Your Honor, I bring to the Court's attention the case of Wise v. Lipscomb.

[5]

It is a Supreme Court case in which the Supreme Court said a new reapportionment plan enacted by a state, including one purportedly adopted in response to invalidation of a prior plan by a federal court, will not be considered effective as law until it has been submitted and received clearance under Section 5. Either in those cir-

cumstances, until clearance has been obtained, should a Court address the constitutionality of the new measure. Based on that, Your Honor, we believe that the Court in this case can examine the one-person/one-vote violation, but Section 5 of the Voting Rights Act gives exclusive jurisdiction to the Justice Department to examine dilution of minority voting strength under Section 5.

THE COURT: Well, Mr. Hall, the officials of Kleberg County, as I understand it, have a new plan which they think is satisfactory to withstand attack on equal representation. This is a case that has been before the Court quite a while. I think it is still before the Court and the Court is ready to proceed at this time.

MR. PARMLEY: Your Honor, does that mean

[6]

that the Court is going to examine the issue of dilution of minority voting rights?

THE COURT: Well, I am going to let the—since you seem to take the position that you don't have to be here anyway, or you or the Plaintiff, I am going to go ahead and let the county, Kleberg County, go ahead and present whatever they wish to present at this time.

MR. PARMLEY: Your Honor, we plan, then, to present some evidence in relation to dilution of voting strength later in the hearing. I guess a decision will have to be made as to whether or not that can be submitted.

THE COURT: Well, I am going to go ahead with it and you will—are entitled to your objections, and if you

think I am wrong, then I am just wrong, but I think that this Court needs to go ahead with this matter at this time. It has been hanging fire and I don't think that the Plaintiffs are entitled to just sit back, if you think that they are not doing things right, you don't always have to come to the courthouse to tell people about it, and so I am going to go right ahead at

[7]

this point.

Mr. Hall, are you ready to proceed?

MR. HALL: Yes, Your Honor, and we will call Mr. Nash, or Dr. Nash, as our first witness.

THE COURT: All right.

ROBERT TAYLOR NASH,

having been first duly sworn upon his oath, testified as follows:

DIRECT EXAMINATION

BY MR. HALL:

Q. Will you state your name, please.
A. Robert Taylor Nash.
Q. How are you employed?
A. By Texas A&I University, Kingsville, Texas.
Q. In what capacity?
A. Dean of the College of Business.
Q. All right, and—address you as Dr. Nash?

[8]

A. That will be fine.

Q. All right. Dr. Nash, you were asked, were you not, to do some work for Kleberg County in connection with determining the population of the various commissioners' precincts according to the 1970 census and in reapportioning the commissioners' precincts in such a manner that each precinct would have as nearly as possible the same population as each other precinct, is that correct?

A. That's correct.

Q. And will you tell the Court, just in your own words, how you went about compiling the information in preparing a plan that would divide the commissioners' precincts into four equally populated areas.

A. Took the 1970 census figures. In this 1970 census of housing the different blocks, blocks in blocks in Kingsville were broken down, given a population for each of these blocks. I took, also, the census figures for enumeration districts out of the City of Kingsville and one other bit of information we had is the King Ranch has two different population bases and each of these population bases are in different commissioners' precincts, and so we took the 1970 King Ranch

[9]

insurance records in order to determine the population on the King Ranch at that time and saw that—all the persons that resided on the King Ranch were either employed by the ranch or were members of a family of King Ranch employees, so they had records which would indicate population at that point in time.

Q. Those are the sources of information you used?

A. Those are the sources I used.

Q. Now, once you had accumulated information with respect to what the populations were of the various areas in the county, what did you do next?

A. At that time I broke the commissioners' precincts down into four separate precincts, or I broke the population down into four different precincts, and then assigned each one, by taking all the different population figures and coming up with a population base for each of the four precincts.

Q. Now, you first got your census information which included populations on a block-by-block basis in the City of Kingsville and the populations in the rest of the county, which is rural, were by enumeration districts, were they not?

A. That's correct.

Q. And I believe you told the Court that in some of

[10]

these enumeration districts, the King Ranch lies in some of them?

A. That's correct, in two of the enumeration districts.

Q. And in order to divide those enumeration districts by population, you went to the King Ranch and obtained its insurance records which reflect the number of people who actually resided in 1970, in the Laureles Division of the King Ranch and in the Santa Gertrudis Division of the King Ranch, is that correct?

A. That's correct, yes.

Q. And when you later broke down those divisions and broke them up, you used the Laureles Division and the Santa Gertrudis Division as parts of those enumeration districts, right?

A. Each of those two enumeration districts were

broken into two parts because the King Ranch employees versus the rest of the enumeration district resided in two different commissioners' precincts.

Q. All right, so turning to specifics, enumeration District No. 3 actually contains a part of the King Ranch, doesn't it?

A. I would have to check. Yes.

Q. And it also includes all of the Santa Gertrudis

[11]

Division, which is a geographical division of the King Ranch?

A. That's correct.

Q. And you found that the Santa Gertrudis Division of the King Ranch, according to 1970 insurance records had a population of 471?

A. That's correct.

Q. So you were able to divide Enumeration District 3 by taking that division with those 471 people out of Enumeration District 3, is that what you did?

A. That's exactly what I did.

Q. And you knew what the enumeration district had to begin with, so when you took 471 out, you knew what was left in that enumeration district?

A. That's correct.

Q. And that is the same thing that you did with respect to Enumeration District 2, Enumeration District 2 contained all of the Laureles Division of the King Ranch?

A. That's correct.

Q. And the Laureles Division, according to King Ranch records, in 1970, had a total population of 196 people?

A. That's correct.

Q. So you were able to split out the Laureles Division

[12]

and knew how many people that would leave and how many it would take out?

A. That's correct, yes.

Q. Now, once you had accumulated that basic information, then the next thing you did, as I understand it, was to decide what the population was by voting precinct, is that correct?

A. That's correct.

MR. HALL: Your Honor, Exhibit 2, we filed with the Court, is a breakdown of voting precincts according to the 1970 census.

THE WITNESS: Excuse me. Let me look at that again. I want to make one—that was based on the earlier voting precincts.

MR. HALL: All right. I misdescribed that in my pleading Your Honor. I believe I described that as the breakdown by voting precincts under the plan as revised and actually it is the breakdown of voting precincts by population according to 1970 census before any changes were made.

Q. (By Mr. Hall). Is that correct, Doctor?

A. That's correct. That is exactly right.

Q. So what you are telling the Court is that with the population information, you then went voting

[13]

precinct by voting precinct and computed the population of each voting precinct according to the 1970 census?

A. That's correct.

Q. All right, and you then divided those voting precincts among the four county commissioners' precincts to come up with an apportionment of population on an equal basis?

A. That's right, yes.

Q. Now, Dr. Nash, in order to do that, it was necessary for you to split a couple of the voting precincts as they were under the previous apportionment plan, is that correct?

A. That's correct. Initially I attempted to break the commissioners' precincts down according to existing voting precincts and the reason for that is that the individuals residing in the different precincts would be able to vote at the places in which they have previously voted, but that was not practical, and so we did break down then some existing precincts in order to come up with apportionment.

MR. HALL: All right. Your Honor, Exhibit 3 to the pleading we filed is a compilation of the various voting precincts that are within each commissioner's precinct

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under the proposed plan and it does indicate those instances in which it was necessary for Dr. Nash to split a voting precinct in order to put the populations in equilibrium and I will ask him about those and how he did it.

Q. (By Mr. Hall) Dr. Nash, Commissioner's Precinct No. 1 reflects that it contains, I believe, six voting precincts and it includes Enumeration District No. 1 and part of Enumeration District No. 2, and, for example, one of the voting precincts that is in Commissioner's Precinct No. 1 is Voting Precinct No. 9, which you in-

dicate was split. Now, would you tell the Court how it was that you split that between Precinct 1 and Precinct 3 and how you knew that by the split that you made you put 484 people in Precinct 1 and 351 in Precinct 3.

A. By using the block-in-block population from the 1970 census, I was able to take each actual block inside the city limits and determine how many people resided in it, and so, by splitting them, I just took the number that resided in the blocks in what will now be Commissioner Precinct 1, was Voting Box 9, and that amounted to 484, so I actually just split the lines, and I did have a

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count based on the 1970 census of this block-in-block, which was described in the census.

Q. So what you are telling the Judge is that you actually had a count of the number of people in each city block within Voting Precinct 9?

A. That's correct, yes.

Q. And you simply took enough city blocks and people out of Precinct 9 and put them—out of Precinct 1 and put them in Precinct No. 3 to make 351, you actually had a physical count according to the 1970 census?

A. That's correct, and tried to use as natural boundaries as possible, and in most instances, straight lines.

Q. All right, and is that how you determined the number of people in each voting precinct that was actually split between two commissioners' precincts?

A. That's correct.

Q. So you actually had the numbers from the 1970 block-by-block census?

A. Yes.

Q. Now, in a couple of instances you used enumeration districts and I think in only the two cases we have already mentioned did you split an enumeration

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district, you split Enumeration District 2 between Commissioner's Precinct No. 1 and Commissioner's Precinct No. 4, is that correct?

A. That's correct.

Q. And in Precinct No. 4 you put only the Laureles Division, that geographic area of the King Ranch that contained 196 people?

A. Yes.

Q. And that left the balance, all of the remainder of Enumeration District No. 2, with its 793 population, in Precinct 1?

A. That's correct.

Q. And you followed the same procedure with Enumeration District 3, you left the Santa Gertrudis Division with its 471 population in Commissioner's Precinct 2 and you put all of the balance of that enumeration district in Commissioner's Precinct No. 3?

A. Yes, the remaining 435 in Commissioner's Precinct 3.

Q. All right. Now, Dr. Nash, when you got through with that and drew the boundary lines that are depicted on Exhibit No. 1 to the pleading which we filed, do you have the figure there that reflects the population of Commissioner's Precinct No. 1 as the lines were redrawn?

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A. Yes, 8,305.

Q. What about Commissioner's Precinct 2?

A. 8,324.

Q. And Commissioner's Precinct No. 3?

A. 8,307.

Q. And Commissioner's Precinct No. 4?

A. 8,336.

Q. All right, and did that produce a variation from the largest to the smallest commissioner's precinct of only 31 people?

A. That's correct, 31 people.

Q. A variation, then, of less than one-half of one percent?

A. Yes.

Q. Dr. Nash, in drawing these boundary lines, did you have any occasion to take into account whether the people within the geographic areas you were working with were Anglo-American or Mexican-American or black, or take into account race or ethnic background at all?

A. I did not.

Q. Were you asked to do that?

A. No, I was not.

MR. HALL: Your Honor, we would offer as Exhibit 1, 2, and 3, the three exhibits that

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are attached to the pleading that is filed with the Court entitled Defendant's Proposed Reapportionment of Kleberg County, Texas, and I don't know whether the Court would like me to mark those again or whether their inclusion in the Court's file already would be sufficient.

THE COURT: I think it would be sufficient. They are in the file, so there is no problem there, except you have an objection, I take it.

MR. PARMLEY: Your Honor, the only thing we would point out is that Exhibit 2, as counsel has pointed out, is the reflected statistics for the 1968 plan and these statistics don't support Exhibit 3, which are basically conclusions that one would assume arise from Exhibit 2.

THE COURT: I understand your objection. I am going to go ahead and admit the exhibits that have been offered. I will keep in mind your objection, but I want to be able to look at the whole picture.

MR. HALL: We have no further questions of the doctor.

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CROSS EXAMINATION

BY MR. PARMLEY:

Q. Dr. Nash, my name is Bob Parmley. I am an attorney for Texas Rural Legal Aid and I am representing the Plaintiff in this case. I am going to ask you a few questions about how you came up with your plan. You mentioned earlier in preparing the plan that you had to split certain enumeration districts, is that correct?

A. No, not enumeration. Yes. I'm sorry. Yes, I did, I split two enumeration districts.

Q. Okay, and what were the enumeration districts that you split?

A. 2 and 3.

Q. And Enumeration District 2 was where the Laureles Division was moved from Precinct 1 to Precinct 4, is that correct? Is that what occurred in this split?

A. No, it was not moved. It was, I think, already in that. I think they were voting in that box at that time. I am not real sure whether they were voting in that box or not. It was not actually moved. It was just a breakdown for this particular plan.

Q. Well, statistically, you said you calculated the

[20]

enumeration district split for the Laureles Division of the King Ranch and the Santa Gertrudis Division based on insurance records, is that correct?

A. That's correct, yes.

Q. Do you have any personal knowledge of how the King Ranch insurance records for 1970 were compiled for the Laureles and Santa Gertrudis Divisions?

A. I do not.

Q. So statistically, the data you used for splitting Enumeration Districts 2 and 3 comes from information supplied you by third parties?

A. It came from information supplied me by Judge McDaniel.

Q. And you have no personal knowledge of the reliability of the statistical information given you?

A. I do not.

Q. Dr. Nash, in the process of drafting your proposed plan, did you ever order a census enumeration district split from the Bureau of the Census?

A. No.

Q. And why didn't you do that?

A. I wasn't aware that it could be done.

Q. Dr. Nash, do you believe that a census bureau

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enumeration district split would be more reliable than the statistical insurance reports that you used that were compiled solely for insurance purposes?

A. If it could be done, I'm sure it would probably be more reliable.

Q. Referring back to Enumeration District 2, what was the total population in that district before the split?

A. 989.

Q. And Enumeration District 3?

A. 906.

Q. Dr. Nash, when were you notified by the Commissioners' Court that they wanted you to draft a redistricting plan?

A. I don't really know the date. It was probably two to three months ago.

Q. And how were you notified? Was it in writing or oral communication?

A. I think it was oral communication.

Q. And do you remember who notified you?

A. Judge McDaniel. Best I can recall, he asked me if I would provide for him a statistical consultant, the name of a statistical consultant, and I asked what the purpose of it was. I indicated that I

[22]

would be willing to do this for him.

Q. What instructions did you receive at the time of notification from Judge McDaniel in reference to drafting the new plan?

A. What—

Q. Instructions. Did he tell you at that time how he wanted the plan drafted, factors to be considered, or was that not discussed?

A. How he wanted?

Q. Yes, how the Commissioners' Court and the Commissioners' Court's instructions to you in drafting a plan.

A. They wanted it broken down on a one-person/one-vote basis and that was the extent of their input on how I would do it.

Q. Did he notify you of that at your initial meeting or discussion with him?

A. Probably not. I don't really recall. I don't recall. I think that I probably met the first time with the Commissioners' Court and this was the first time I actually had information as to exactly what they wanted.

Q. Okay, now, when you did meet with the Commissioners' Court, how long after your meeting with Judge McDaniel was that?

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A. Well, I didn't actually meet with Judge McDaniel, I talked with him on the phone, and probably, if I can recall correctly, he might have contacted me on a Monday and I met with them on a Friday, I'm not sure, it may have been a Thursday, I'm not sure, but it was a few days.

Q. Okay, and at your meeting with the Commissioners'

Court, did you meet with the full court in a formal session?

A. I don't really know. I think it was a formal session. As a matter of fact—the best I recall, it was a formal session because they acted on some business prior to talking with me.

Q. Okay. Now, at that time, did the Commissioners' Court ask you to take into consideration certain geographical boundaries in drawing the precinct lines?

A. I'm sorry, but I am not following the exact question.

Q. When they asked you to come up with a new plan, did they give you an instruction that you should take into consideration certain geographical boundaries such as major thoroughfares, rivers, things like that?

A. No.

[24]

Q. And did they ask you to take into consideration previous county maintenance districts?

A. No.

Q. And did they ask you to take into consideration the ethnic balance of the individual precincts?

A. No.

Q. How soon after you met with the Commissioners' Court did you have another meeting with them?

A. I don't know. It was—I guess I probably met with the Court two or three times in a period of maybe six weeks. I don't recall the exact dates. I don't have the record of the exact dates.

Q. Well, was it a couple of weeks in between?

A. A week or two weeks, yes.

Q. Now, at your second meeting with the Commissioners' Court, what was the substance of the discussion at that meeting in reference to the drafting of the new plan?

A. I don't recall.

Q. Well, did you go to them at that time and say, "I have been working on the plan. Here is some of my ideas. What do you think about it"?

A. I never did ask them what they thought about it, and I think in each instance I talked with them a couple of times and gave them what I have done, but

[25]

I was not asking for their advice on how to go about doing it.

Q. And when you gave them what you had done, did they give you any feedback as to whether they wanted it done that way or another way?

A. They might have given some feedback, but nothing formal, no formal request or anything as to how they wanted it done.

Q. And did you have a third meeting with the Commissioners' Court or was it just two?

A. I think there were three meetings.

Q. What took place at the third meeting?

A. I presume I presented the final plan.

Q. And what discussion occurred at that time concerning the plan, either positive or negative criticism of the plan?

A. I don't really—I don't recall whether there was positive or negative criticism. That was a formal meeting.

I am sure their records would indicate what kind of comments were made.

Q. Well, did they ask you at that time to explain the plan you had drafted?

A. Oh, yes.

Q. And did they ask you to make any corrections at that time in the plan?

[26]

A. I think one correction. One of the commissioners had a justice of the peace in his particular district who had an office in the courthouse and they asked if I would draw the boundary around the courthouse, and since it didn't have any population in that particular block, then I did that.

Q. So you received at least one instruction on how to draw the plan from the Commissioners' Court, is that correct, which you followed?

A. That's correct. It had nothing to do with population, but it was just strictly to serve that commissioner's precinct.

Q. Think back. Do you think there were any other instructions that you received from the Commissioners' Court that affected the drafting of the proposed plan?

A. I would think not.

Q. Do you believe that racial factors in any way influenced the drafting of the proposed plan, either directly or indirectly?

A. From my standpoint, no. I did not even take it into consideration.

Q. Did any of the commissioners ever approach you and talk about the racial composition of the precinct lines as you proposed them?

[27]

A. No. I didn't see the commissioners, with the exception of the formal meetings.

Q. Did you have any informal conferences with Judge McDaniel other than the initial contact?

A. I did, yes.

Q. And how many of those conferences did you have, approximately?

A. One or two. I don't recall.

Q. Okay, approximately how far into the drafting of the plan was your second informal contact with Judge McDaniel?

A. I don't know if I had two informal contacts. Actually, all my contact was just to present to him what I had done to that point in time, so I don't recall.

Q. And what was his response when you would present what you had done?

A. His response was it was fine, that I was the one that was being paid to do it.

Q. Did he ever give you any suggestions on how to complete the part of the plan that you hadn't completed up to that point?

A. No.

Q. What factors convinced you to draw the redistricting plan in the manner in which you did?

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A. Population.

Q. Of course there is a variety of ways that you could have equalized each of the county precincts to adjust the population. Was there anything else?

A. Well, I tried to use natural boundaries and tried to stay in the existing voting precincts as much as possible. I initially tried to break it down on existing voting precincts, just moving precincts, and the first time I came—the first time that I completed that, I think I came up with about three thousand population, so I saw right away that that was not practical, so my attempt was to remain as much as possible along existing voting precincts, to use natural boundaries and to take into consideration population and population only.

Q. Why did you decide to take election Precincts 3, 4 and most of 11 out of County Precinct 1 and put them in County Precinct 4?

A. That's the way it broke down.

Q. Well, it would be possible, wouldn't it, to move people from Precinct 2 into Precinct 4, rather than people from Precinct 1?

A. I would have to see the map and then give you some indication as to why I did it. It would be possible to move people from any one of the four

[29]

precincts into any other precinct, yes.

Q. So why did you move them from Precinct 1 to Precinct 4?

A. If I could see a map, then I would—okay, you are referring—I didn't actually have the existing precincts, so I was not trying to move from one to another. I didn't use the existing commissioners' precincts, I used only voting precincts, but so far as moving from one precinct—from one commissioner's precinct to another

commissioner's precinct, I was not concerned with that, only with respect to voting precincts.

Q. The Commissioners' Court and the commissioners individually did not give you any feedback as to how you may be, by your plan, adversely affecting their precincts that would have made you conscious of how you were shifting the county precinct lines?

A. I was probably conscious, but I didn't know what the precincts were. I was conscious if I did something that probably adversely affected them, but I didn't know how it adversely affected them or whether it was a positive effect. I was aware of some effects, but as far as them indicating whether or not I had made a change that was crippling to them, they just didn't do that.

[30]

Q. Were there any people in the community other than the commissioners and the county judge that approached you and made recommendations to you on how to draw this plan?

A. No. What do you mean, other than the county judge? I don't think that I indicated that the county judge gave me—would you mind restating your question?

Q. Well, I mean did you have any communication with anyone else other than the commissioners and the county judge in reference to this plan—

A. No.

Q. —where a person might have discussed with you how to draw it?

A. No.

Q. In the process of drafting the proposed plan, was a statement ever made to you concerning the ethnic composition of a precinct?

A. Not to my knowledge. I am pretty well—I am reasonably aware of the ethnic population in the community.

Q. Did anyone ever make a statement to you about how your proposed plan would ethnically affect voting rights?

A. No. If it did, I didn't take it into consideration

so I don't think that anyone did.

MR. PARMLEY: We pass the witness, Your Honor.

MR. HALL: No further questions, Your Honor.

THE COURT: You may step down.

MR. HALL: We call Judge W. C. McDaniel, Your Honor.

THE COURT: Counsel, this witness says that he is urgently needing to leave town. Is there anything further you want?

MR. PARMLEY: No, sir, That's fine.

THE COURT: So I can excuse him?

MR. PARMLEY: Yes, sir.

THE COURT: All right.

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W. C. McDANIEL,

having been first duly sworn upon his oath, testified as follows:

DIRECT EXAMINATION

BY MR. HALL:

Q. Would you state your name, please.

A. W. C. McDaniel.

Q. And, Judge McDaniel, how are you connected with Kleberg County officially?

A. I am County Judge of Kleberg County.

Q. How long have you been County Judge?

A. This is my ninth year.

Q. All right. Judge McDaniel, you have just heard Dr. Nash testify concerning the procedure by which he redrew commissioners' precinct lines in Kleberg County to equalize population between commissioners' precincts. Did the Commissioners' Court request Dr. Nash to make that study?

A. Yes, sir.

Q. All right, and Dr. Nash said that he was given no instructions with respect to achieving any particular ethnic balance or result in drawing these particular lines, that is he wasn't told to

[33]

put so many Mexican-American residents in one commissioner's precinct and so many in another and so forth;

did you give him any instructions to do anything of that sort?

A. I gave him instructions to take the 1970 census data and to draw four commissioners' precincts on a one-man/one-vote rule, as near as possible.

Q. All right. Now, he has told us how he went about it and he said that he came back and presented the information he had prepared to the Commissioners' Court, and among the items that we have filed with the Court is a map which is Exhibit 1 and that map is a map only of the City of Kingsville, but let me ask you, did the commissioners—were the commissioners presented with a map that broke the City of Kingsville into these four commissioners' precincts indicated on Exhibit 1?

A. Yes, they were.

Q. All right, and then the boundary lines of the commissioners' precincts proceed on generally out to the edge of the county in each of the four directions.

A. Yes, sir, they go out and join the original precinct boundaries, out to the end, where they extend out to the west and to the east.

[34]

Q. So with the exception of perhaps the Laureles and Santa Gertrudis Divisions, the boundary lines were changed only inside the City of Kingsville?

A. That's correct.

Q. And the boundary lines outside the City of Kingsville remain the same for the four commissioners' precincts?

A. Yes, sir.

Q. All right. Now, as far as this proposal is concerned,

after Dr. Nash prepared the reapportionment that would divide the population equally, did the Commissioners' Court sit down and look at the lines as he had drawn them to see what it did to the area within each commissioner's precinct and the number of roads and other items of that type that might fall within a given commissioner's duties as far as upkeep, maintenance, county government?

A. The only thing that was considered at the time that we were presented with this map was the population for each precinct. We were all interested in getting, as near as possible, to the one-man/one-vote, and, as Dr. Nash stated, the only consideration was the courthouse and keeping it in Precinct 1 because the existing

[35]

justice of the peace of Precinct 1 does have his office there, and since it involved nobody living in that particular block, we did keep the courthouse in Precinct 1, Commissioner's Precinct 1.

Q. All right. Well, other than the City of Kingsville, did the area served by each commissioner remain about the same?

A. Yes, sir.

Q. In other words, if you take Commissioner's Precinct 4 as shown in Exhibit 1, there are some changes in the boundary lines of that precinct within the City of Kingsville, but outside the City of Kingsville, the rural area remains the same?

A. Yes, sir.

Q. All right, and is that the same with 1, 2 and 3?

A. Yes, sir.

Q. And actually, under Texas law, the commissioners'

duties are confined largely to areas outside the City of Kingsville; you don't have that much authority inside the city, do you?

A. That's correct.

Q. You don't build roads and streets and sewers and that sort of things inside the incorporated city?

A. No, sir.

[36]

Q. All right. Dr. Nash said that he attempted, as nearly as possible, Judge McDaniel, to use the existing voting precincts. Is that important from the commissioners' point of view?

A. I don't see that it would be important from a commissioner's point of view. It would be important from the voting situation in an election to have each one vote in the voting precinct, to vote at one place. However, the way that he split the precincts, there would be no commissioners running at the same time from either one, so it will not make any difference insofar as an election is concerned.

Q. Actually, there is an election which was to be conducted in 1980, at least according to state law, for what commissioner's precinct?

A. That will be Commissioner's Precincts 3 and 1.

Q. All right. And, Judge McDaniel, let me ask you another question now. Dr. Nash said that he was provided with information concerning the 1970 population of the Laureles and Santa Gertrudis Divisions of the King Ranch. Did you obtain that?

A. We asked the King Ranch bookkeepers to search their records. I first talked with them and found that they did have a record on all of their employees.

[37]

The only people that lived in the Laureles and the Santa Gertrudis Divisions in 1970 were employed by the King Ranch and they had a complete record of all of these people.

Q. Did you know of any other source from which you might obtain that information?

A. No, sir.

Q. And did you provide that information then to Dr. Nash.

A. Yes, sir.

Q. And I believe, Judge McDaniel, that—well, let me ask you, did they tell you that the Laureles Division of the King Ranch had a population, according to their insurance records, of 196, back in 1970.

A. Yes, sir.

Q. And did they tell you that the Santa Gertrudis Division of the King Ranch had a population of 471 back in 1970?

A. Yes, sir.

Q. Now, again, just for the record, are there any incorporated towns or cities in Kleberg County other than Kingsville?

A. I believe that a portion of Corpus Christi extends down along part of the bay over here and that is—

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no people concerned in it.

Q. All water?

A. Yes, sir.

Q. But as far as an incorporated town with residents

actually living there, Kingsville is the only one in Kleberg County?

A. Yes, sir.

Q. And just one other series of questions, Judge McDaniel, as far as the election is concerned, what is the first deadline for the 1980 elections? Let me ask you, have voter registration cards been sent out?

A. Yes, sir.

Q. And do those voter registration cards indicate voting precincts in which voters are to register?

A. Yes, sir.

Q. All right. Now, what is the next deadline in connection with the 1980 election in Kleberg County?

A. I believe that in filing for county offices, the filing begins January 5th is the earliest and then thirty days later is the deadline for filing for county offices.

Q. All right, and so far as county officials who will be affected by any reapportionment or redrawing of

[39]

county commissionner precinct lines is concerned, of course the two commissioners would be, would they not?

A. Yes, sir.

Q. Are they required to live within the precinct in which they run?

A. Yes, sir.

Q. All right, what about justices of the peace, are they also affected by where the commissioners' precinct lines are?

A. Yes, sir.

Q. Must they reside within the commisisoner's precinct in which they run?

A. Yes, sir.

Q. And how many justices of the peace, if you know, will have to file for and be elected in 1980?

A. I don't really know at this time. I am just not familiar at this time.

Q. Do you know if there is a justice of the peace in each one of the four commissioners' precincts?

A. Yes, sir.

Q. So at least two would be up for election?

A. Yes, sir.

Q. Judge McDaniel, after Dr. Nash presented this possible reapportionment to the Commissioners'

[40]

Court, did the Commissioners' Court look at it to see what it did with respect to population and what it did with respect to boundary lines?

A. Yes, sir.

Q. Did you all review it to decide whether it was something that you felt would be consistent with your duties as Commissioners' Court in governing the county?

A. I think that we all shared a common interest in examining it and we wanted to get just as close as possible to the equal voters in each precinct according to the '70 census, and on that basis is what each commissioner examined it and of course they were interested in knowing how much came out of their precinct or how much went into their precinct, they were interested in seeing that because until Dr. Nash brought the map down, none of the commissioners knew what was coming out of their precinct or what was going to be put in it.

Q. And did the commissioners agree to present this proposal to the Court?

A. Yes, sir, it was officially adopted at the Commissioners' Court meeting to be presented to the Court.

Q. And you will adopt it if the Court permits you to

[41]

do so?

A. Yes, sir.

MR. HALL: No further questions, Your Honor.

THE COURT: All right.

CROSS EXAMINATION

BY MR. PARMLEY:

Q. Judge McDaniel, do you have personal knowledge of how the King Ranch insurance reports for 1970 were compiled for the Laureles and Santa Gertrudis Divisions?

A. I don't have personal knowledge, no.

Q. And any knowledge you have, you received from a third party, is that correct?

A. I received from their bookkeeper, who kept the records, yes.

Q. And you have no personal knowledge as to the reliability of those records, do you?

THE COURT: An outfit like the King Ranch

[42]

is not going to doctor its records, Counsel.

MR. PARMLEY: Your Honor, my line of questioning has to do with basically who is included in these insurance records, do they include just full time employees, do they include part-time employees, do they include people on leave of absence, do they include their dependents? I have no idea what statistics were in these insurance reports. They weren't produced here today. So far as I know, they could solely mention the employees who were full time, which would be wholly inaccurate as far as the population count.

MR. HALL: Your Honor, I believe the testimony has been that these were reported to be people who live on the King Ranch, which is the exclusive property of the King Ranch.

THE COURT: I think it's satisfactory. The objection is overruled, Counsel.

Q. (By Mr. Parmley) Judge McDaniel, what consideration, if any, did the Commissioners' Court give to Plaintiffs' proposed Plan A and B?

A. I suppose you would say we looked at it.

Q. And after looking at it, what did the Commissioners' Court decide as far as what action to

[43]

take with reference to it?

A. I think we decided that if the Court told us to re-

district, we would redistrict ourselves rather than having Texas Rural Legal Aid come in and draw it for us.

Q. Do you believe that racial factors in any way influenced your decision to take that position?

A. No.

Q. If, as you state, Judge, that the sole purpose of the Commissioners' Court in drafting a new plan was to satisfy the one-person/one-vote requirement, why didn't the Commissioners' Court submit Plaintiffs' Plan A and B to Dr. Nash to examine as a starting point?

A. Because we wanted him to be on his own in drawing the plan, not be polluted by any other plans that might be presented.

Q. When you say polluted, in what respect do you mean polluted?

A. Well, his mind drawn on something else. When he is told to do something and you give him something to look at and he sees that, we want his mind fresh, where he could do it himself rather than be influenced by what somebody else had given him.

Q. Isn't it true, Judge McDaniel. that you didn't want

[44]

Dr. Nash to come up with a plan similar to Plaintiffs' Plan A and B?

A. I didn't tell him what plan to come up with, Mr. Parmley.

Q. But you didn't offer him Plaintiffs' Plan A and B to study, did you?

A. I didn't offer him a plan that I had drawn up, either.

Q. Judge McDaniel, do you believe that racial factors were a secondary consideration in any way in the drafting of the county's proposed redistricting plan?

A. No.

Q. Did any of the commissioners ever discuss with you formally or informally the racial results of the proposed redistricting plan by the county?

A. Oh, I suppose after the plan was adopted, it might have been talked about, not in a meeting or anything formal, after the plan was adopted, you would naturally know, by living in Kingsville and living in Kleberg County, where the population lives and what the makeup is, so I suppose you couldn't help but talk about it.

Q. Well, who did you talk about it with with reference to the ethnic results of the plan?

[45]

A. I don't remember.

Q. Well, briefly, what was the result of your conversation?

A. Mr. Parmley, I have so many conversations with the commissioners, that I can't remember everything I talk about with them.

Q. Judge McDaniel, would you say that the Commissioners' Court was somewhat delighted that the outer segment of the Barrio, which was in Precinct 1, was now shifted into the Barrio again?

A. I would not.

Q. When you say there was some discussion of the racial results of the plan after the plan had been drafted, were there any discussions prior to the drafting of the plan?

A. Mr. Parmley, what I am trying to do is be truthful to the Court, to the best of my knowledge, and I have discussed with you on numerous times the racial makeup of plans and you have discussed it with me. Never has any discussion been made on an ulterior motive.

Q. Well, Judge McDaniel, that's why I am pursuing this line of questions, because of the results of our discussion. Let me ask you that question again. Prior to the drafting of the plan, in the process

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of drafting it, did you participate in any discussions with the Commissioners' Court as to the racial results of any proposed plan?

A. No, because we didn't know what plan he was going to make up until Mr. Nash brought it in to us.

Q. How many meetings did you have with Dr. Nash other than formal Commissioners' Court meetings?

A. Probably two, maybe three.

Q. When did the first one take place?

A. When I called him on the telephone.

Q. And what did you tell him at that time?

A. I asked him, as Dr. Nash stated awhile ago, if he knew of someone in the Accounting Department at Texas A & I University who would work on some statistics for us in drawing a one-man/one-vote according to the '70 census.

Q. And what was his response?

A. He said he could probably get someone and then he asked me how would we do it and I told him we would use the enumeration districts and census data; that he could meet, or the person, they would need to meet with

us, and he said, "I will be able to do that myself," and I said, "Fine, will you meet with us at our meeting that we are going to have in two or three days and we will discuss it."

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Q. And when did you have your second meeting with Dr. Nash other than a formal Commissioners' Court meeting, approximately?

A. Oh, about a week later, I suppose.

Q. And what did you discuss with him at that time?

A. Well, he needed some maps and he showed—had a general knowledge of figures that he was working on and we just met for about five minutes.

Q. Did you make any recommendations to him at that time as to how to draft the plan?

A. I did not.

Q. And you said you had a third meeting with him.

A. When he finished.

Q. And this was other than the formal meeting of the Commissioners' Court?

A. Yes, he brought all the data in to me for me to present to the Court.

Q. And what was the substance of that meeting?

A. He showed me how he went about doing it and the enumeration districts, he had a map of the county, and how he had gone block by block and showed me the figures which he had compiled.

Q. And did you give him any recommendations on possible changes to the plan at that time?

A. No, I did not.

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Q. You didn't mention to him at that time that there was a JP for precinct 1 that was stationed at the courthouse and there would be a need to keep him in County Precinct 1?

A. Yes, I believe I previously testified I told him that.

Q. And did you tell him that at the third meeting you had with him?

A. We might have told him either at that meeting or at the Commissioners' Court meeting, I don't remember, but he was told that.

Q. Was there anything else you told him as far as drafting the plan, directions—

A. No, no directions.

Q. —on how to do it?

A. Uh-uh.

Q. Now, my understanding that the Commissioners' Court did not tell Dr. Nash to take into consideration geographical boundaries in drawing his plan, is that correct?

A. I think the only thing, thinking back, that I might have told Dr. Nash was to try to keep the voting precincts together as much as possible and to break as few as he could. That was probably the only thing that he was told.

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Q. Was any mention made to try and preserve original county maintenance districts?

A. No.

Q. And you stated earlier the issue of the balance of the precincts was not discussed?

A. No, sir, it was not.

Q. Judge McDaniel, who was elected to the Commissioners' Court in the 1968 election?

A. '68?

Q. I'm sorry, 1978 election.

A. Commissioner Lomas.

Q. And one other commissioner?

A. Yes, Commissioner Collins was re-elected.

Q. And what county precinct is Commissioner Lomas from?

A. Four.

Q. And what county precinct is Commisioner Collins from?

A. Two.

Q. And you stated earlier that in the upcoming 1980 election, the offices for county commissioner for Precincts 3 and 1 are open?

A. That's correct.

Q. Judge McDaniel, did the 1980 election in any way influence the drafting of the county's proposed plan?

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A. It did not, because we figured that after the 1980 census comes out, we will have to redistrict again.

Q. Well, my question is directed to since there were some changes in County Precincts 1 and 3, were those changes in any way influenced by the election that is going to take place in November of 1980?

A. They were not.

Q. I believe you testified earlier that certain election districts had to be split and that cards had already been mailed out to the individual voters. What was indicated on those cards as to where these voters would go to vote?

A. It just has the voting precinct number on it.

Q. So whether or not an election precinct has been split, do they go to their normal polling place within that election precinct, is that how it is going to work?

A. Yes.

Q. So the county hasn't, through their proposed plan, actually re-enumerated election precincts, they have simply split them and preserved the polling place to reduce the confusion among the voters?

A. That's correct. We figure that when we draw a new redistricting plan after the census, we will

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probably have to redraw all the voting precincts anyway, so we will just re-do the whole county at the same time.

Q. Judge, did you testify earlier that you were not aware that you could get a population enumeration split from the United States Census Bureau?

A. I believe Dr. Nash testified to that.

Q. Well, were you aware of that possibility?

A. No, I wasn't.

Q. Judge McDaniel, you don't recall that in the trial of this case the Plaintiffs put on two plans in which enumeration district splits had been furnished by the Bureau of the Census?

A. No, I thought that you all did it yourselves. I didn't know the census bureau split it for you.

Q. So no effort whatsoever, to your knowledge, was made to contact the Census Department to try and get an enumeration district split from them?

A. That's correct.

MR. PARMLEY: Your Honor, we pass the witness.

MR. HALL: No further questions, Your Honor.

THE COURT: You may step down.

MR. HALL: We have no more testimony.

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Your Honor.

MR. PARMLEY: Your Honor, we have one witness.

THE COURT: Do you have anything?

MR. PARMLEY: Yes, sir, we have one witness we would like to call.

THE COURT: All right.

MR. PARMLEY: Plaintiffs call to the stand Dr. Stan Bittinger.

THE COURT: All right. We will be in recess about fifteen minutes.

(Recess)

The COURT: I think you are the next witness.

MR. PARMLEY: Yes, Your Honor, we call Dr. Stanley Bittinger.

THE COURT: All right, Doctor, if you will come up here and be sworn and take your seat.

MR. PARMLEY: Your Honor, prior to introducing any testimony, we request that the Court incorporate all previous testimony in this case into this hearing.

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THE COURT: Do you wish to furnish me with a written transcript of it?

MR. PARMLEY: Well, this incorporation by reference.

THE COURT: All right.

STANLEY BITTINGER,

having been first duly sworn upon his oath, testified as follow:

DIRECT EXAMINATION

BY MR. PARMLEY:

Q. Would you state your name, please.
A. Stanley Bittinger.
Q. Where are you presently living?
A. Kingsville.
Q. And by whom are you presently employed?
A. Texas A & I University.
Q. And what is your—

THE COURT: Has this witness been on the

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stand before?

MR. PARMLEY: Yes, sir.

THE COURT: Well, I'm not going to take into account his prior testimony. You can't put him on the stand now and add to what you have already used him for and I am not going to go back and hunt notes and spend hours trying to figure out what he testified before, so you are just going to have to rely on his testimony before the Court at this time.

MR. PARMLEY: Yes, sir. Your Honor, if opposing counsel will agree to a stipulation of Dr. Bittinger's credentials as an expert, we can save the Court some time because we have previously gone through this.

MR. HALL: I don't know. As an expert what, Your Honor? I assume—I don't remember what Dr. Bittinger testified to last time, but I assume Dr. Bittinger is simply going to testify to some statistics, as Dr. Nash did.

MR. PARMLEY: That's correct.

MR. HALL: Well, I will stipulate, I guess, Your Honor, that he is an expert in working with numbers, if that is what counsel wants.

[55]

MR. PARMLEY: That's fine.

THE COURT: All right.

Q. (By Mr. Parmley) Dr. Bittinger, have you had an opportunity to review the 1968 Kleberg County apportionment plan?

A. Yes, sir.

Q. And in your review of the 1968 Kleberg County apportionment plan, did you study the ethnic breakdown precinct by precinct?

A. Yes, I did.

MR. PARMLEY: Have this marked Plaintiffs' Exhibit 1.

Q. (By Mr. Parmley) Dr. Bittinger, does this chart which is marked Plaintiffs' Exhibit No. 1 accurately reflect your statistical analysis of the 1968 Kleberg County apportionment plan as you testified prior in this hearing?

A. Yes, it does.

MR. PARMLEY: Your Honor, we would like to introduce in evidence Plaintiffs' Exhibit No. 1.

THE COURT: All right, it will be admitted.

Q. (By Mr. Parmley) Dr. Bittinger, have you had an opportunity to review the county's proposed redistricting plan which I believe is marked

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Defendants' Exhibit A, using methods and data commonly used and accepted by scholars in your professional field?

A. Yes, I have.

Q. And in your review of the county's proposed redistricting plan, did you study the ethnic breakdown, precinct by precinct?

A. Yes, I did.

Q. And do you know approximately what the percentage of Mexican-Americans are in each of the proposed county precincts?

A. Yes, I do.

MR. PARMLEY: Could we get this marked Plaintiffs' Exhibit No. 2?

Q. (By Mr. Parmley) Dr. Bittinger, what is the percentage of Mexican-Americans in Precint No. 1 according to the county's proposed plan?

A. Mexican-Americans in Precinct 1, approximately twenty-four percent.

Q. And what is the percentage of Mexican-Americans in Precinct 2?

A. 38.5 percent.

Q. And the percentage of Mexican-Americans in Precinct No. 3?

A. 11 percent.

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Q. And the percentage of Mexican-Americans in Precinct No. 4?

A. 91 percent.

Q. Dr. Bittinger, does Plaintiffs' Exhibit No. 2 accurately reflect your calculations concerning the ethnic distribution according to the county's proposed plan, precinct by precinct?

A. Yes, it does.

MR. PARMLEY: Your Honor, we would like to introduce in evidence Plaintiffs' Exhibit No. 2.

THE COURT: Any objection?

MR. HALL: Not at this time, Your Honor.

THE COURT: All right, it will be admitted.

Q. (By Mr. Parmley) Dr. Bittinger, in comparing the ethnic statistics between the 1968 apportionment plan and the proposed apportionment plan, what county precinct involves the largest shift of ethnic statistics?

A. Precinct 1 seems to have had a major change and Precinct 4 somewhat minor change.

Q. According to the 1968 apportionment plan, what was the ethnic composition for County Precinct No. 1?

A. In 1968, the '68 study, based on '70 census figures,

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in Precinct 1, we had seventy-two—no, fifty-nine percent Anglos and now it is seventy-two percent Anglos, and we had forty percent Mexican-Americans and now it is twenty-four.

Q. And when you say and now it is twenty-four, you're referring to the proposed—

A. Under the new plan. Excuse me. Under the new plan, it would be twenty-four percent instead of forty percent as previously.

Q. What is the total net reduction of Mexican-Americans under the proposed plan in County Precinct 1 as compared to the 1968 plan?

A. About sixteen percent, something like that.

MR. PARMLEY: We pass the witness, Your Honor.

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CROSS EXAMINATION

BY MR. HALL:

Q. Dr. Bittinger, have you actually looked at these two to see how much real difference there is between the two of them in terms of election results, for example?

A. I don't fully understand your question. I'm sorry.

Q. Well, you have presented the Court with simply a statistical tabulation of numbers of Mexican-Americans and Anglos by commissioners' precincts according to the 1970 census and the 1968 plan and the 1979 plan. What I am asking you is as a practical matter under either plan, in 1968, according to 1968 plan, or 1979 plan, you had a large majority of Mexican-Americans in Precinct No. 4, did you not?

A. Right, yes.

Q. And the only difference is that that large number has been decreased slightly in the 1979 plan, right?

A. In Precinct 4, yes.

Q. And a few more, four percent more Anglo voters have been put into Precinct No. 4?

A. That's right.

[60]

Q. So in terms of a change in the voting power or strength of the people, there is not a great deal of change there, is there?

A. Doesn't appear in that particular precinct there, no.

Q. Okay, there is not a great deal of change there. Let's go up to Precinct No. 3. Precinct No. 3, there is an increase of about eight percent in the Anglo and a

decrease of about seven percent in the Mexican-American. That doesn't really reflect any great shift in voting strength one way or the other?

A. Depends on what you mean by great. There is a slight shift. It depends on who is looking at it.

Q. But really it is not pronounced, you wouldn't call that a substantial change in terms of what the results were going to be, for example, if people voted along ethnic lines, would you?

A. Depends on the election. All I can say is that there is a change.

Q. Now, let's go up to Precinct No. 2. In Precinct No. 2, the 1979 plan decreases the number of Anglos in the precinct and increases the number of Mexican-Americans both by roughly eight or nine percent, doesn't it?

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A. Yes.

Q. All right, so in Precinct No. 2, according to this plan the Court is considering right now, you actually have a large—not a large, but you have thirty-eight percent Mexican-American voters in Precinct No. 2, and let me ask you, Dr. Bittinger, as far as candidates in Precinct No. 2 are concerned, under this particular proposal, if you had two or three or four candidates who are running for commissioner in Precinct No. 2, they would all have to be concerned with how the Mexican-American residents of that precinct voted, wouldn't they, because the Mexican-American constituency in Precinct No. 2 is a substantial one?

A. Thirty-eight percent, yes.

Q. My question, though, is that if you have two or three or four who are running for commissioner in that precinct, none of those candidates could afford to ignore the Mexican-American voting strength, could they, could he?

A. No.

Q. All right, and as a practical matter, isn't that the same with Precinct No. 1, you have got twenty-four percent Mexican-American in Precinct No. 1,

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according to this plan that the Court is considering right now, and if you have candidates who are competing for election from that precinct, when you have as many as twenty-four percent, almost one-fourth of the population Mexican-American, none of those candidates can afford to ignore the voting strength and desires of the Mexican-American voters, can they?

MR. PARMLEY: Your Honor, we object to that question. He is asking Dr. Bittinger to speculate on political consequences of—

THE COURT: Well, that's what you are asking for, isn't it, a difference in voting so you can exert more political influence, isn't that what you are asking?

MR. PARMLEY: Your Honor, we are simply presenting these statistics with reference to the ethnic breakdown.

THE COURT: Well, that is not your reason for being here, though, is it? Isn't it basically your position they

are not getting enough chance to vote, have an opportunity to effectively vote? Isn't that what you are really talking about?

MR. PARMLEY: That is one of the things

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we are talking about, Your Honor.

THE COURT: Okay. That's all I wanted to know about that. I am going to listen to the doctor here.

Q. (By Mr. Hall) Basically the same situation, isn't it, Doctor, that you have in Precinct No. 2, not quite so pronounced, but when you have competing candidates for commissioner of Precinct No. 1 with twenty-four percent Mexican-American and four percent up, those candidates, if they want to get elected, cannot afford to ignore the wishes of the Mexican-American and the other four percent.

A. I am not speaking as a political person with great knowledge in politics, I am here just to testify about the numbers, but before there were forty percent, now there are twenty-four percent, so they can ignore them more than before if they wish to ignore them.

Q. Well, you are here as an expert in numbers, but as an expert in numbers, you would know that if you want to get elected, which depends on the number of votes you get, if you were running in Precinct No. 1, you, Stanley Bittinger, were running in Precinct No. 1, against three other candidates, for commissioner of the precinct, you couldn't afford to ignore

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twenty-eight percent of the voting strength of that precinct, according to population, could you?

A. No.

Q. Did you analyze these two plans according to numbers of people as well, Dr. Bittinger?

A. You mean are these statistics, the percentages, based on numbers?

Q. Yes.

A. Actual persons in each block, yes.

Q. You could put the actual number of people alongside the percentages?

A. Yes, I guess I could.

Q. Would it be too much to ask you to just put the numbers alongside these percentages so the Court will know what we are talking about in terms of actual people as opposed to percentages?

A. I didn't bring all my figures. I can send those to you. I didn't bring them with me here to the stand.

Q. Well, the reason I asked, Dr. Bittinger, is because if you have got just two people and you move one of them, that is fifty percent, and sometimes percentages don't reflect all that there is to know about the demography of a particular area.

A. I understand the logic of your question.

[65]

Q. I understand you were just asked to give the percentages and not the numbers?

A. That's right.

Q. Are you telling us you don't have any of the numbers present?

A. I have a lot of data here. It would take a little while to find it, but I could eventually find it if you—

MR. HALL: Your Honor, I don't want to take the Court's time up on those now.

THE COURT: Doctor, I think you said a minute ago that you did have some that you don't have with you, or at least it would take a little time.

A. That's right.

THE COURT: So let's pass on to something else and then let the doctor, at his convenience, within the next few days, furnish the Court with that information. Can you do that?

A. Yes. I have been working on it for the past few days or so and I have stacks of papers with a calculator—

THE COURT: Well, I'm not trying to put you out, but if you could do that, it might

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save the Court some time.

MR. HALL: I have no further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. PARMLEY:

Q. Dr. Bittinger, in your study of census data, do Anglos or Mexican-Americans generally have larger families?

A. Mexican-Americans, in South Texas, generally have larger families.

Q. So the 1970 census figures represent or actually show a number of Mexican-Americans that does not reflect on their voting strength in comparison to the Anglo figures here?

A. That's right, there would be larger percent of the Mexican-American population under fifteen.

MR. PARMLEY: Pass the witness, Your Honor.

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RECROSS EXAMINATION

BY MR. HALL:

Q. Well, Dr. Bittinger, that would have been as of 1970. Now every one of those people is nine years older than would be the case in 1970, right?

A. We just have the 1970 figures to go on.

Q. I am not criticizing you, but I am saying that on the basis of the 1970 census, which is all anyone has to go on, unfortunately, all of these numbers that you have calculated, according to the 1979 plan, would include, if those people are even still there, which we don't know, but if they are still there, in all of those larger families that you're speaking of, anyone who was

within nine years of voting age, that was anyone who was nine years old, is now voting, so you would—

A. People keep having babies and if we were to go back and count these people, a lot of people in 1970 were ten, would now be married and have children.

Q. Well—

A. So it would increase the number of young people still.

Q. But all we are doing is going on the basis of the 1970 census, right?

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A. Yes.

Q. Okay, and what I am asking is, for example, in Precinct No. 1, if you had twenty-four percent of the population Mexican-American, they are a lot more of that twenty-four percent now who are of voting age than there was back in 1970, right?

A. Possibly.

Q. Okay, and if the population has grown, you say people keep having babies, why, this twenty-four percent is probably larger than twenty-four percent now, isn't it?

A. If they are still in the community.

Q. Okay, but that was the hypothesis that was given you, so wouldn't your testimony to the Court be that among these Mexican-Americans who are living in these precincts, according to the 1979 plan, since it was formulated on the basis of the 1970 census, if we are asked to assume that everyone is still there who was there in 1970, more of the Mexican-Americans are of voting age and there is a larger percentage of Mexican-Americans in each one of these precincts because of the—

MR. PARMLEY: Your Honor, we would object to this line of questioning because it is speculative.

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THE COURT: This whole thing is speculative, Counsel.

MR. PARMLEY: Well, there are some facts that are more reliable than others.

THE COURT: Okay, your objection is overruled.

Q. (By Mr. Hall) Well, Dr. Bittinger, I understood you to tell Mr. Parmley that a lot of these people were not of voting age in the Mexican-American populations you have indicated, right?

A. Yes.

Q. Now you were speaking on the basis of the 1970 census, weren't you?

A. Correct.

Q. And all I am asking you is that having taken those percentages, it would be true that there are many more Mexican-Americans among that twenty-four percent who were there in 1970 who are of voting age now than there were in 1970?

A. You have to assume a certain dynamic model when we deal with these census statistics, when we are doing a census analysis of any country over a period of time, unless we can establish that there has been a dramatic increase in the birth rate or decline in the birth rate or decline in the death rate. If we

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assume the death rate and birth rate is approximately the same, then we study migration statistics and look at a town like Kingsville or Alice or Falfurrias, towns of similar demographic characteristics, as people reach voting age, there has been a tendency for those to leave the community and others to stay in the community and marry and have children, and you come in ten years later as a census tabulator, you find the same kind of demographic characteristics, you don't find a drastic increase in the number of voters because a lot of those—if they all stayed there, it would be different, but if you assume the same kind of migration characteristics you had earlier, then the picture would be roughly the same. Once we have some kind of indication, as I said, there has been a change in the birth rate or change in the death rate or change in the migration rate, you have to figure all those things in to get some kind of estimate of what it is like now as compared to what it was ten years ago.

Q. But your analysis didn't take into account any of them, did it? I mean you analyzed the '79 plan according to the 1970 census.

A. That was what I was asked to do, to see was the

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equitable to have been introduced in 1970.

Q. And you assumed that everybody who was there in 1970 is still there in 1979, didn't you?

A. No, we assumed that the same kind of demographic characteristics are the same.

Q. You mean that in reaching these percentages that are on Plaintiffs' Exhibit 2, you didn't use the precise figures that are in the 1970 census?

A. Yes, I did, but according to the questions I was asked here, how many of these are now of voting age, and we were assuming that since we had no indication —we had some estimates of the population size of Kingsville now compared to what it was in '70. This indicates a relatively minor change, which indicates that a lot of young people are still migrating out, a lot of people are still having babies, and we have certain increase at the younger age and certain voting age people are migrating to places like Houston and Corpus Christi.

THE COURT: Let me ask one question. We are talking about a ten year period. Do you take into account any increase in the size of the community? Is Kingsville much larger or any larger than it was ten years ago? Seems to

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me like, Dr. Bittinger, it is a bigger town than it used to be.

A. According to the estimates we get from the census, it shows a growth of about a thousand.

THE COURT: About a thousand?

A. So really not all that much.

THE COURT: So it really doesn't make that much difference?

A. No.

Q. (By Mr. Hall) Dr. Bittinger, what about where they are? Are you not only assuming that there is the same number of people there now as in 1970, but also that they are living in exactly the same place that they did before?

A. To do our statistics, we have to rely on the most accurate figures we have available.

Q. But you can answer that question yes or no, can't you?

A. It appears there is some housing development taking place in County Precinct 1, going south, but we have no—no one, neither Dr. Nash nor I, has any way of knowing exactly how many are there in Precinct 1.

Q. Let me try again, Doctor. Didn't you assume that the people who were there in 1970 are living today in the same places they lived in 1970?

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A. By the nature of the facts, we had to do that.

Q. So your answer is yes?

A. Yes.

Q. And don't you know, as a matter of fact, that that is probably not the case?

A. Right.

Q. So what you are telling the Court is that your analysis in 1979 is based on 1970 figures?

A. Right.

Q. Although you know that the people are not all in the same block in which they were counted in 1970?

A. That's right.

Q. And when you told Mr. Parmley that the Mexican-American has a much larger family, of course you don't really know whether that's so in 1979, do you? You haven't seen any census statistics on that?

A. There have been a few studies in South Texas. That's why I said, before I answered his question, that in South Texas, in general, there have been some sample studies done in areas, in South Texas areas.

Q. But the census will give you precise figures on that?

A. That's right.

Q. And these percentages you are using to analyze the

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1979 plan are based on the precise figures, not assumptions?

A. That's right.

Q. So as far as assuming on the basis of a larger number of children or a larger number of nonvoting members, you don't have any statistics on that at all?

A. Not for Kingsville.

MR. HALL: That's all I have, Your Honor.

REDIRECT EXAMINATION

BY MR. PARMLEY:

Q. Dr. Bittinger, the county's proposed redistricting plan, to the best of my understanding, maybe you can

correct me if your studies indicate otherwise, is simply a frozen picture of where people lived in 1970 and according to that picture, the county has redistricted their plan on a one-person/one vote basis, is that correct?

A. Yes.

[75]

Q. So all of these objections your counsel has to changes in the 1970 plan, which he questioned you in relation to ethnic statistics, would also apply in relation to statistics for one-person/one-vote; by that, I mean people have moved out, there have been changes in the community that would not be reflected in their plan as they propose it here today.

A. All the plans that I have examined have been based on the 1970 census.

MR. PARMLEY: No further questions, Your Honor.

THE COURT: That is the only accurate information you had?

A. That's right.

MR. HALL: I have no further questions.

THE COURT: You may step down.

MR. PARMLEY: Your Honor, we have no further witnesses to call.

THE COURT: All right. I would like to hear a little argument on this.

Would it be more convenient from counsel's standpoint, both of you, to just give me briefly, right now, what you rely on primarily as your particular position? Could that be done? I am

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not asking for any extensive detailed argument because I have done some work on it, but I would like to hear briefly from both of you.

MR. PARMLEY: Yes, sir, I am prepared to give a brief outline.

THE COURT: Well, that's all I am asking for. Mr. Hall, are you?

MR. HALL: I am, Your Honor, though I am not armed with citations of cases because counsel has not filed any written objections or proposals with respect to the plan.

THE COURT: Well, I just want to get a handle on the respective positions, so I guess since you started, you are first.

MR. HALL: Fine. Your Honor, I don't understand the Plaintiffs to be making any challenge at all to the reapportionment in Kleberg County on the basis of the one-man/one-vote results which have been achieved by the plan which has been submitted. I don't understand there to be any question about the mathematics. I understand there is some challenge to the source of the information on the basis of which the Laureles and Santa

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Gertrudis Divisions were split out of their respective enumeration districts, but I think under the federal rules, the Court is entitled to take into account the information on the basis and in the form in which it was presented and we think there is ample reason to give credence to the reports which were received from the King Ranch as to the residents on those divisions. We also think that even if there was a fifty percent error in figures, the deviation in the overall results obtained would not make the plan invalid although we are not suggesting there is any error at all.

Really, Your Honor, I think this brings us to the question that the Plaintiffs have raised now with respect to the Court's jurisdiction to consider and order this plan into effect. We have proceeded on the basis that this was a contested case in which the Plaintiffs have suggested at the outset that there has been a violation of the Plaintiffs' Fourteenth Amendment rights in connection with the making up of the commissioners' precincts. The Plaintiffs came to court in an effort to

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prove that by showing that there has been discrimination against Mexican-Americans and that there has been a dilution of the Mexican-Americans' voting power in Kleberg County. After trial on the merits, the Court concluded that there had been no showing whatsoever of any Fourteenth Amendment violation and it is our position in the lawsuit, with the issue having been raised and with the Court having concluded that as of this time

there has been no dilution of the voting strength whatsoever, that the Commissioners' Court is not now required to take race or ethnics into account in drawing a new plan, which has been directed by the Court, and which is to rectify only the one-man/one-vote deviation that has previously existed.

Counsel's argument is that the Court can only direct a one-man/one vote plan and the Court has no authority on the question of dilution. Well, we don't think dilution is in the case at this juncture, but I think that—I don't know what counsel proposes, Your Honor. If it is that the Court can approve this plan tentatively, but the next step is

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up to the Justice Department to review it, then it seems to me that that is tantamount to the Court's abdication of its position in the case, and simply asking the Justice Department, "What do we do now for a remedy?" I don't think that was ever contemplated by the Voters Rights Act or by the cases that have been decided by the Fifth Circuit. So far as I am concerned, the issue of voting is not before the Court. It has been resolved in the Defendants' favor. The only question is, does this plan satisfy the one-man/one-vote requirement, and we think that it does and there has been no successful challenge to that.

THE COURT: All right, Counsel.

MR. PARMLEY: Your Honor, Lister requires that the new plan be based on the 1970 census. We have testimony that's uncontroverted today that this plan is

not based on the 1970 census, even though the Defendants were capable of getting an enumeration district split, to that degree they have not met the requirements of Lister, which is the basis, I believe, of the Court's finding as far as the need for the—one of the bases for the need for

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reapportionment.

Your Honor, assuming that the Court does adopt the Commissioners' Court plan as not in violation of the one-person/one-vote principle, the issue of dilution of minority voting rights must be examined according to the Voting Rights Act, and again I would remind the Court of what the United State Supreme Court said in the case of Wise v. Lipscomb, and that was the same case as cited by this Court in its order, and the Court in that case said, "A new reapportionment plan enacted by a state, including one purportedly adopted in response to invalidation of a prior plan by a federal court, will not be considered effective as law until it has been submitted and has received clearance under Section 5. Neither in those circumstances, until clearance has been obtained, should a Court address the constitutionality of the new measure."

Therefore, Your Honor, pursuant to Wise v. Lipscomb, the Plaintiffs move that the Defendants' plan not be found constitutional until it has received Section 5 preclearance, and further, Your Honor, the Plaintiffs move

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that the February, 1980 filing deadline for offices based on the country commissioner precinct lines be enjoined

until such time as the county can get clearance through the Justice Department or the United States District Court sitting in Washington, D.C.

THE COURT: All right.

MR. HALL: I would like to reply just to two points, Your Honor. First of all, as far as the 1970 census argument, Counsel is telling the Court that the proposal we have submitted is not based on the 1970 census, and I assume that the reason for that is the splitting of the two enumeration districts involving the King Ranch. All that counsel has done, Your Honor, by way of showing that better information might have been available is to ask the witnesses whether an enumeration district split was obtained from the Bureau of the Census, but there isn't any evidence, Your Honor, before the Court, that such a thing could have been done. All he has asked is did you try to do this, and Dr. Nash said, "I didn't try to, and I don't know whether you could get one of those or not," so as far as

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that question is concerned, one, it is true that the split was not made on the basis of the 1970 census itself, but I think the Court can find that this is reliable information and that in view of the result achieved by using that very logical split of those two enumeration districts, there is no shortcoming of the plan on that score.

As far as Wise versus Lipscomb is concerned, Your Honor, Counsel has said that Justice Department approval must be obtained in the case of a plan adopted by a legis-

lature or a governmental body and I am aware of cases that hold, Your Honor, that after the plan is completely prepared, approved and adopted and then the governmental unit goes to court and says, "We would like to do this," that that may be construed as the county's plan rather than the Court's plan, but the evidence here is that the county commissioners have not adopted any plan at all, they were directed to submit a format to the Court and the Court is free to review that plan, to make alterations if necessary, but it is the Court's prerogative to direct the plan be adopted, and I personally

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don't think that that slight degree of difference ought to determine the results of such an important consideration as reapportionment, but that's what the Fifth Circuit may be headed toward, and all I am suggesting to the Court is that we have employed an expert witness, which I suppose could have been done by the Court, or by opposing counsel, we have submitted a proposal which was prepared by that expert witness without any direction or intervention by the Commissioners' Court other than to keep the commissioners' precincts in balance on a one-man/one vote basis, if the Court directs that that plan be put into effect, if the Court adopts it and says "This is our plan, we only have one more election, really, before the 1980 census is out, I want the county to adopt this plan," then as I see it, that is the Court's plan and the county, of course, will adopt it and we do not think that the clearance provisions of the Voters Rights Act apply in that case, and if the Court will recall, Judge McDaniel did not say, "We have adopted this plan," all he said was the

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Commissioners' Court authorized the preparation of the plan as one means of redistricting the county. We don't think that the preclearance requirements of the Voters Rights Act apply.

THE COURT: All right.

MR. PARMLEY: Your Honor, if I may have just a moment here. As the Court quoted in its order in this case, quoting Wise v. Lipscomb, the Court stated, "When a federal court declares an existing apportionment scheme unconstitutional, it is appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new plan, if forthcoming, will then be governing law unless it, too, is challenged and found to violate the Constitution." That's the plan of action this Court took into effect. The Commissioners' Court has submitted a plan for the Court to adopt. This Court has taken the position that it doesn't want to order and devise its

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own plan, and I would remind the Court additionally that in the recent case heard in this courtroom of Arriola versus Harville, the Jim Wells redistricting case which went before a three-judge federal court, in their statement of findings of fact, they found that the 1974 redistricting plan in that case which was ordered by this Court

—I am quoting now, Paragraph 5 of the statement of facts, "The 1974 redistricting plan is a court-approved plan and not a court-devised one and must be submitted to the Department of Justice for preclearance pursuant to Section 5 of the Voting Rights Act."

Your Honor, we submit that the Court has allowed the legislative body, in this case the Commissioners' Court, to come up with their plan. They have come up with their plan and submitted it to the Court for adoption, as in the Jim Wells case, and as Wise v. Lipscomb pointed out, this Court now has to submit that plan to the Department of Justice for Section 5 preclearance and that the constitutionality of that plan should not be judged until such time as the Section 5 preclearance of that plan has

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been accomplished.

THE COURT: All right, I have heard the arguments. We will be in recess. I don't know how soon I will be able to give you an answer, but it won't be long.

(Reporter's Affidavit Omitted)

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C.A. No. C-78-11

JOSE SANCHEZ, ET AL., Plaintiffs

vs.

W. C. McDANIEL, ET AL., Defendants

PLAINTIFFS' EXHIBIT "1"
HEARING ON PLAN 12/10/79

KLEBERG COUNTY STATISTICS
FOR 1968 APPORTIONMENT PLAN
ACCORDING TO 1970 CENSUS

Precinct #1	Anglo	59.69%
	Mex-Amer	40.41%
Precinct #2	Anglo	69.1%
	Mex-Amer	30.9%
Precinct #3	Anglo	68.0%
	Mex-Amer	18.4%
	Black	13.6%
Precinct #4	Anglo	4.3%
	Mex-Amer	95.7%

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C.A. No. C-78-11

JOSE SANCHEZ, ET AL., Plaintiffs

vs.

W. C. McDANIEL, ET AL., Defendants

PLAINTIFFS' EXHIBIT "2"
HEARING ON PLAN 12/10/79

KLEBERG COUNTY STATISTICS
FOR PROPOSED 1979 PLAN
ACCORDING TO 1970 CENSUS

Precinct #1	Anglo	72.0%
	Mex-Amer	24.0%
	Other	4.0%
Precinct #2	Anglo	60.0%
	Mex-Amer	38.5%
	Other	1.5%
Precinct #3	Anglo	76.0%
	Mex-Amer	11.0%
	Black	12.8%
	Other	.2%
Precinct #4	Anglo	8.7%
	Mex-Amer	91%
	Other	.3%

80-180

Supreme Court
FILE
SEP 8 19
MICHAEL RODAK, J

IN THE

Supreme Court of the United States

October Term, 1980

No. _____

W. C. McDANIEL, ET AL.,
Petitioners

v.

JOSE SANCHEZ, ET AL.,
Respondents

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in holding that a proposed reapportionment plan, submitted by a local legislative body in response to an invalidation of a prior plan, does not lose its status as a legislative rather than court-ordered plan for purposes of the preclearance provisions of the Voting Rights Act, 42 U.S.C. 1972(c) merely because it is the product of litigation conducted in a federal forum?

2. Did the Court of Appeals err in holding that a new reapportionment plan enacted by a state, including one purportedly adopted in response to the invalidation of the prior plan by a federal court, will not be considered effective as law until it has been submitted and has received clearance pursuant to the preclearance provisions of the Voting Rights Act, 42 U.S.C. 1973(c)?

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IN THE

Supreme Court of the United States

October Term, 1980

No. _____

W. C. McDANIEL, ET AL.,
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v.

JOSE SANCHEZ, ET AL.,
Respondents

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Jose Sanchez, Israel Trevino, Natividad De La Rosa, and Santos De La Rosa and the classes they represent, respectfully pray that Petitioners' Petition For Writ Of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on April 14, 1980, in Fifth Circuit Cause No. 80-1108, be denied.

STATEMENT OF THE CASE

Pursuant to Rules 22 and 34.2 of the Supreme Court, the Respondents, while not concurring totally with the Petitioners' characterization of the facts, will not restate

the case beyond correcting the following inaccuracies and omissions:

Testimony from the December 10, 1979 hearing on the plan revealed that the Petitioners, in fulfillment of their legislative duty to reapportion, decided to employ a statistician, Robert Nash, Ph.D., to assist them in the drafting of a new redistricting plan, (R. 8, 21, 22). After hiring Dr. Nash, the Petitioners gave him instructions on how to draft the redistricting plan, which he followed, (R. 22, 25, 26). After at least three meetings with the Petitioners, in both formal Commissioners Court meetings and informal meetings, Dr. Nash completed the plan, (R. 23, 24). He then presented the plan to the Commissioners Court at a formal meeting called in the ordinary course of that legislative body's business. After explaining the plan to the Petitioners, Dr. Nash was asked by the Petitioners to make a correction, which he did, (R. 25, 26). The Petitioners then officially adopted the plan at a formal meeting as the plan they would submit to the district court, (R. 40), and the plan they would officially adopt if the district court permitted them to do so, (R. 40, 41). When asked why the Commissioners Court did not consider either of Respondents' plans, the County Judge stated the Commissioners Court would rather "redistrict ourselves" if given the opportunity by the district court, (R. 42, 43).

On January 14, 1980, the district court entered an order adopting the Petitioners' plan without modification. The district court found the plan satisfied the principle of one-person, one-vote but made no finding in relation to the dilution of minority voting rights and at the same time found that Section 5 preclearance was unnecessary, (Appendix, p. A-22).

SUMMARY OF THE ARGUMENT

No significant conflict exists between the courts below in differentiating legislative apportionment plans pursuant to *Wise v. Lipscomb,* 437 U.S. 535 (1978) and court-ordered apportionment plans pursuant to *East Carroll Parish School Board v. Marshall,* 424 U.S. 636 (1976). Indeed, the Court of Appeals for the Fifth Circuit is so certain of the difference between *Wise* and *East Carroll,* as applied to the facts of the instant case, that they summarily reversed the district court and denied a rehearing and a rehearing en banc. Because there is no significant confusion of the law in the courts below and because the facts of this case do not raise any new issues previously unresolved by this Court, this case cannot be considered to be of national importance and certiorari should be denied.

REASONS FOR DENYING THE WRIT

The Petitioners argue that sound judicial discretion dictates that a writ of certiorari should be issued because of a perceived inability on the part of the Court of Appeals to accurately distinguish between a court-ordered plan and a legislative or court-adopted plan in light of this Court's rulings in *Wise v. Lipscomb, supra,* and *East Carroll Parish School Board v. Marshall, supra.* Additionally, the Petitioners argue that this apparent confusion will generate even more uncertainty in the wake of 1980 reapportionment litigation. After a brief comparison of the instant case to *East Carroll, Wise* and *Marshall v. Edwards,* 582 F.2d 927 (1978), *cert. den.* 442 U.S. 909 (1979), the Petitioners conclude that the present case involves a court-ordered plan which is not subject to the

Section 5 preclearance requirement as the Petitioners interpret the legislative history of the Voting Rights Act. Respondents disagree with this analysis and in support thereof offer the following points and authorities:

I.

No Significant Conflict Exists Among The Circuits In Differentiating Legislative Apportionment Plans Pursuant To *Wise* And Court-Ordered Plans Pursuant to *East Carroll.*

After this Court's *per curiam* decision in *East Carroll,* confusion existed over the definition of a legislative apportionment plan and a court-ordered apportionment plan. The confusion partially was a result of this Court's brief discussion of a court-ordered plan vis-a-vis a legislative plan in dicta found in footnote 6 of *East Carroll.* Since the decision in *East Carroll,* however, this Court has clarified the pre-existing confusion, *Wise, supra,* and *Connor v. Coleman,* 440 U.S. 612 (1979). In *Wise,* a decision rendered just two terms ago, this Court, in a lengthy opinion, explained the difference between the two types of election plans, providing much needed guidance to the courts below.

The Petitioners argue that the Court of Appeals for the Fifth Circuit has incorrectly interpreted *East Carroll* and *Wise* and that therefore this Court should intervene and supply assistance. The Petitioners are not arguing that a conflict exists among the various circuit courts of appeal. Indeed, this researcher could find no cases outside of the Fifth Circuit that discuss the difference between a court-ordered apportionment plan and a legislative apportion-

ment plan in relation to *Wise* and *East Carroll.* If any confusion exists, then, the confusion must be found within the Fifth Circuit itself. However, with the exception of *Marshall v. Edwards,* 582 F.2d 927 (5th Cir. 1978) *cert. den.* 442 U.S. 909 (1979), there have been no Fifth Circuit cases that were decided with a dissenting vote on the issue of whether or not an apportionment plan is court-ordered or legislative in character. The instant case is typical. The Fifth Circuit in a *per curiam* opinion, summarily reversed the district court's categorization of the instant plan as a court-ordered plan; a categorization reached simply because the plan was prepared during the course of litigation. A rehearing and a rehearing en banc was denied. Apparently, none of the twenty-four judges in active service on that court perceived any confusion with regard to the issue at hand. The Petitioners' argument for clarity in the midst of what they perceive as confusion amounts to nothing more than an illusory argument which will not support a grant of certiorari.

II.

The Instant Case Does Not Involve Issues of National Significance.

The Petitioners' argument that this case presents issues of national significance is premised on their claim that confusion exists in the courts below, which this Court should clarify. As stated earlier, the confusion in the courts below created by this Court's dicta in *East Carroll* has been clarified by this Court's later ruling in *Wise.* Hence, this case lacks national significance and certiorari should be denied. And, assuming, *arguendo,* that a conflict exists in the courts below, the issues and facts raised

by this case would be of no assistance in clarifying *Wise* or *East Carroll.*

The issue raised on appeal below was restricted to the district court's order dated January 10, 1980, wherein the court reasoned that because the "Kleberg County Commissioners' Court did not reapportion the Commissioners' Court precincts on their own authority, but instead did so in *response* to a court order," the reapportionment plan "is a court-ordered plan rather than a court-adopted plan and therefore is not subject to the preclearance provisions of the Voting Rights Act." (Emphasis added) (Appendix, district court's order, p. A-23; also see framing of the issue on appeal by the Court of Appeals, p. A-27). It was this issue alone that the Court of Appeals decided and it is this issue alone that was raised by the district Court's order. (Appendix, p. A-23, A-27).

The Petitioners argue in their petition matters which were never considered in the district court's order and the Court of Appeals' decision. (Appendix, p. A-21, A-26). The Petitioners apparently have chosen to expound on new theories of relief which may prove more fruitful to them at this juncture of the case. This type of free-for-all appellate approach urged by the Petitioners should be discouraged because it does a disservice to the district court and the Court of Appeals as well as to the integrity of the appellate process. Indeed, Justice White, when announcing the decision of this Court in *Wise,* declined to consider the impact of Section 5 to that case, where the State of Texas became subject to the Voting Rights Act while the case was on appeal, because the "Court of Appeals did not deal with it one way or another." *Wise, supra,* 437 U.S. at 547. This decision was supported by

all of the Justices and the Chief Justice of this Court. *Wise, supra,* 437 U.S. 547, 549, 550. Similarly this Court should decline the petitioners' invitation to review matters of the first instance which were not presented to the district court and the Court of Appeals. For these reasons, Petitioners' request for certiorari should be denied without further consideration.

However, should this Court desire to pursue issues not previously determined by the courts below then Respondents would contend that this case is controlled by the decision in *Wise v. Lipscomb, supra,* not by the dicta found in a footnote in this Court's *per curiam* decision in *East Carroll.*

In *East Carroll,* the district court adopted an at-large reapportionment plan without discussing the relative merits or demerits of a single-member plan. This Court held that when United States district courts are "put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation", single-member districts are to be perferred absent unusual circumstances. And, that "in shaping remedial relief" the district court abused its discretion in not initially ordering a single-member reapportionment plan, *East Carroll, supra,* 424 U.S. at 639, 640. Additionally, in dicta found in a footnote in *East Carroll,* the applicability of Section 5 of the Voting Rights Act to legislative and court-ordered election plans is discussed. This dicta apparently is the result of issues raised solely in the amicus brief of the United States, which neither of the parties briefed or argued. In the footnote discussion of legislative plans and court-ordered plans no mention whatsoever is made of *Burns v. Richardson,* 384 U.S. 73 (1966). *Burns* involved a legis-

lative apportionment plan where the legislative body lacked authority to enact the plan, consequently, the plan had to be implemented by court order. Because of the failure of the *East Carroll per curiam* opinion to cite *Burns,* Respondents agree with Justice Powell in his concurring opinion in *Wise,* that *East Carroll* should be read as turning on its peculiar facts, *Wise, supra,* 437 U.S. at 549.

Several facts in *East Carroll* which were determinative of that plan becoming a court-ordered plan do not exist in the instant case. First, the submission of the plan was "precipitated" by the court after the 1970 census was published and was not the result of having the existing apportionment scheme declared unconstitutional, as in the instant case, thereby increasing the level of judicial involvement in *East Carroll, Zimmer v. McKeithen,* 485 F.2d 1297, 1301 (1973). Second, the plan in *East Carroll* that was submitted was not a legislative plan, but rather a resubmission of the judicially-inspired "consent decree" plan of 1968, unlike the legislatively-created plan in the instant case, *Marshall v. Edwards,* 582 F.2d 927, 929 (1978), *cert. den.* 442 U.S. 909 (1979). Third, the plan in *East Carroll* that was submitted was not adopted by the legislative body, as in the instant case, (R. 40, 41); instead, it was endorsed by only a few members of the legislative body, *Zimmer v. McKeithen,* 467 F.2d 1381, 1383 (5th Cir. 1973). And, finally, the enabling legislation which would have permitted the parish police jury to propose an at-large system was opposed by the Attorney General under Section 5; hence, the jury could not propose a constitutionally valid plan nor did the jury have the authority to enact a constitutionally valid plan. Here, however, the Petitioners hired an expert, consulted

with him and were the architects of a plan that the district court acquiesced in adopting. Furthermore, the Petitioners had the authority to enact the plan, as is more fully explained below.

The Petitioners also argue that *Wise v. Lipscomb*, 437 U.S. 535 (1978) does not apply to the instant case. In *Wise*, an action was brought by certain minority-race residents of Dallas, Texas, against the mayor of Dallas and members of the Dallas city council. The district court held that the at-large system of electing city council members, as mandated in the city charter, unconstitutionally diluted the voting strength of black citizens. The court then afforded the city council an opportunity to prepare a constitutional reapportionment plan. Thereafter, the city council proposed an ordinance that would provide for eight council members to be elected from single-member districts and for the remaining three members, including the mayor, to be elected at large. The district court then approved the plan and the city council formally enacted the ordinance. Later the district court issued an opinion sustaining the council's plan as a valid legislative act, notwithstanding state constitutional and statutory provisions requiring a referendum vote to amend the city charter. *Lipscomb v. Wise*, 399 F.Supp. 782 (N.D. Tex. 1975). On appeal, however, the Court of Appeals reversed, holding that the district court had erred by evaluating the council's actions only under constitutional standards rather than also applying the principle that absent exceptional circumstances, "judicially imposed" reapportionment plans should employ single-member districts. *Lipscomb v. Wise*, 551 F.2d 1043 (5th Cir. 1977). The Supreme Court reversed and remanded. Although unable to agree on an opinion, six members of the Court agreed

that the "eight/three" ordinance was a "legislative plan" to be judged under the relatively more lenient constitutional standards, rather than a "judicial plan", subject to the stricter standards requiring single-member districts in the absence of special circumstances.

Justice White announced the judgment of the Court, and in an opinion joined by Justice Stewart, expressed the view that when the district court invalidated the provisions of the Dallas city charter mandating at-large council elections, the city had the duty to devise a substitute plan rather than to leave the matter to the district court. The court also found that the district court was entitled to consider the city council's substitute plan under the principles applicable to legislatively adopted reapportionment plans rather than judicially imposed plans. Furthermore, the Court observed that even though the council itself had no power to change the at-large system as long as the city charter was declared unconstitutional, the council was free to exercise its inherent legislative powers by enacting the eight/three plan. In conclusion this Court found that council's ordinance should not be regarded as a court-ordered plan subject to a level of scrutiny more stringent than that required by the Constitution.

Justice Powell, joined by Chief Justice Burger, and Justices Blackmun and Rehnquist, concurring in part and concurring in the judgment, agreed that the reapportionment plan adopted by the Dallas City Council was a "legislative" plan for purposes of review by a federal court. They further expressed the view that the plan was "legislative" regardless of whether the council had the power under state law to reapportion itself, the essential

point being that the city council had exercised a legislative judgment which reflected the policy choices of the elected representatives of the people rather than the directive of a federal court.

Justice Marshall, joined by Justices Brennan and Stevens, dissenting, expressed the view that since the Dallas city council had no authority under state law to reapportion itself, the plan ordered by the district court should have been evaluated in accordance with the federal common law of remedies applicable to judicially devised reapportionment plans. Even if the plan were properly to be viewed as a "legislatively enacted" plan, it should not be approved, since the nature of the underlying violation invalidating the original apportionment system under the city charter was the dilution of the voting power of a racial minority resulting from the effects of at-large voting, and thus it was inappropriate either for the local legislative body or a court to respond with more of the same.

The facts found in the majority opinion in *Wise* parallel the facts in the instant case. First, when the district court found the Kleberg County apportionment plan unconstitutional, the court, citing *Wise,* deferred judicial imposition of a plan pending action by the legislative body to reapportion itself. The legislative body in the instant case responded to its duty and decided, when given the opportunity, to "redistrict ourselves". (Testimony of Kleberg County Judge, W. C. McDaniel, R. 43). The Commissioners Court then adopted a plan for presentation to the district court as the plan they officially wanted and would, if permitted by the district court, adopt, (R. 40, 41). Second, the plans presented

in the instant case and in *Wise* were not in violation of any federal law, unlike the Section 5 opposition in *East Carroll.* Third, the Commissioners Court had the authority and enabling legislation to propose the plan they did and to act as the city council had in *Wise.*

Petitioners argue that *Tex. Elec. Code Ann.,* art. 2.04, which pertains to the redrawing of election precincts, constitutes a restriction on the powers granted the Commissioners Court in the Texas Constitution. Specifically, Petitioners argue that Art. 2.04 of the Texas Election Code prohibits the redrawing of election precincts except in a July or August term of the Commissioners Court, and since their plan was proposed in November, the Commissioners Court was without authority to act. The Petitioners rely on *Wilson v. Weller,* 214 S.W.2d 473 (Tex. Ct. Civ. App. 1948) for authority.

Petitioners in their argument overlook the fact that the Commissioners Court redefined the county precinct lines in the instant case without modifying the boundaries of the election precinct lines, (R. 50). In Texas, "commissioner court precincts" or "county precincts" are composed of electoral sub-units, known as "election precincts" or "voting precincts". Pursuant to Art. 5, Section 18 of the Texas Constitution, "commissioners court precincts" or "county precincts" are creations of the Texas Constitution while "election precincts" or "voting precincts" are statutorily created. *Texas Elec. Code Ann.,* art. 2.04. Since the Commissioners Court did not redefine the boundaries of the election precincts, they were not restricted by Art. 2.04 of the Texas Election Code and were free to act under Art. 5, Section 18 of the Texas Constitution.

Under Art. 5, Section 18 of the Texas Constitution the Commissioners Court is vested with the power and authority to divide the county "from time to time, for the convenience of the people, into precincts", no more than eight and no less than four. This provision of the Constitution, among other things, applies to the redistricting of county precinct lines. As the Court of Civil Appeals said in *Dowlen v. Rigsby,* 43 S.W. 271 (Tex. Ct. Civ. App. 1897); "When the (Commissioners) court was once established, no legislation was needed to enable it to exercise the powers given by the above provision (Art. 5, Section 18 of the Texas Constitution), to divide the county into precincts. The direction is plain and simple, and without condition or restriction, except that as to the number of precincts." *Ibid.* at 273. To date, this interpretation of the law is still in effect. Even the Petitioners' own authority, *Wilson, supra,* makes it clear that the Commissioners Court had the power and authority to act in the instant case.

In *Wilson,* the Commissioners Court redistricted two commissioners court precincts as well as two voting precincts on June 7, 1948. An action was brought challenging the authority of the Commissioners Court to issue the redistricting order. The Court of Civil Appeals upheld the issuance of an injunction by the District Court and found that the redistricting was improper because the Commisioners Court not only redistricted the county precincts, but also redistricted the voting precincts. In its opinion, the Court of Civil Appeals cited *Rigsby,* saying:

> Appellants rely upon State ex rel. Dowlen v. Rigsby, 17 Tex. Civ. App. 171, 43 S.W. 271, opinion by Judge Williams, who afterwards served with distinction as a member of the Supreme Court.

> In the case cited, it was held that under the constitutional grant of power contained in Article 5, section 18 of the Texas Constitution, Vernon's Ann. St., a commissioners' court could divide the county into commissioners' precincts and justice precincts whenever said court was of the opinion that the convenience of the people would be served thereby. In the Rigsby case it does not appear that election precincts were affected by the order there involved, or that the commissioners' court sought to transfer territory from one voting precinct to another. In the present case election precincts are involved and the order of June 7, 1947, insofar as it relates to election precincts is ineffective and void.

Wilson, supra, at 474.

Finally, the Petitioners argue that the legislative history of the Voting Rights Act indicates that the plan in the instant case should not be subject to Section 5 preclearance. Respondents disagree. The legislative intent behind the enactment of Section 5 of the Voting Rights Act was that cases like the instant one be precleared pursuant to Section 5 rather than escape preclearance under equitable jurisdiction of a district court. This is clearly expressed in the Senate Report on the Voting Rights Act Extension, which states in part:

> Thus, for example, where a federal district court holds unconstitutional an apportionment plan which predates the effective date of a coverage under the Voting Rights Act, any subsequent plan ordinarily would be subject to Section 5 review. In the typical case, the court either will direct the governmental body to adopt a new plan and present it to the court for consideration or else itself choose a plan from among those presented by various parties to the litigation. In either situation, the court should defer

> its consideration of—or selection among—any plans presented to it until such time as these plans have been submitted for Section 5 review. Only after such review should the district court proceed to any remaining fourteenth or fifteenth amendment questions that may be raised.

U.S. Code, Cong. & Admin. News, 94 Cong., 1st Sess. 1975, Vol. 2, p. 784, 785, Sen. Rpt. No. 94-295, p. 18, 19.

Certainly it was never intended by the authors of the Voting Rights Act that a plan could be adopted by a district court without a finding on the issue of dilution by either the district court or the United States Attorney General as in the instant case.

CONCLUSION

For the reasons set out above, Respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,

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Supreme Court
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NO. 80-180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

W. C. McDANIEL, ET AL.,
Petitioners

v.

JOSE SANCHEZ, ET AL.,
Respondents

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR PETITIONERS

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---

BRIEF FOR PETITIONERS

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in holding that the District Court, after invalidating Kleberg County's existing apportionment of commissioners' precincts, could not assess the constitutionality of and order into effect a new apportionment plan which had not been precleared pursuant to Section 5 of the Voting Rights Act, 42 U.S.C.

1973(c), when the new plan (a) was prepared and presented in response to an order of the District Court, (b) was not prepared by county officials but by a third party expert, (c) was not to be adopted for use by county officials until it had been reviewed, approved, and ordered into effect by the District Court, and (d) had been subjected to an evidentiary, adversary hearing before the court?

PARTIES TO THE PROCEEDING

Petitioners, who were appellees in the Court of Appeals and defendants in the District Court, are W. C. McDaniel (County Judge of Kleberg County, Texas), V. T. Collins, Earl Hubert, and Doyle Dreyer (Kleberg County Commissioners), Ura Dean Ware (Kleberg County Clerk), and J. S. Scarborough III (Kleberg County Sheriff).

Respondents, who were appellants in the Court of Appeals and plaintiffs in the District Court, are Jose Sanchez, Israel Trevino, Natividad De La Rosa and Santos De La Rosa, who sued "on their own behalf and on behalf of all registered voters" and on behalf of all "similarly situated Mexican-American voters residing within County Commissioners' Precincts 1, 2 and 3." (Plaintiffs' First Amended and Supplemental Complaint, paragraphs 19 and 20)

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On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR PETITIONERS

OPINIONS AND JUDGMENTS DELIVERED BY THE COURTS BELOW

The following, listed in chronological order, are the pertinent opinions and orders of the trial court and of the United States Court of Appeals for the Fifth Circuit:

(1) The District Court's Memorandum and Order of October 2, 1979, finding a constitutionally impermissible numerical disparity between the four

Kleberg County Commissioners' precincts, finding no dilution of Mexican-American voting strength, and ordering that a new plan be prepared and submitted to the court. (Petition for Certiorari, Appendix, p. A-1).

(2) The District Court's Order, dated January 10, 1980, declaring the new apportionment plan to be constitutionally acceptable, finding that preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. 1973(c), was not required, and directing that the 1980 primary and general elections be conducted thereunder. (Petition for Certiorari, Appendix, p. A-21).

(3) The District Court's Order of January 29, 1980, noting that the Court had "filed an order implementing a new apportionment plan for the 1980 elections" and denying respondents' motion for injunction pending appeal. (Petition for Certiorari, Appendix, p. A-24).

(4) Opinion Order of the United States Court of Appeals for the Fifth Circuit, dated April 14, 1980, holding that the trial court erred in assessing the constitutionality of and in ordering the new apportionment plan into effect without preclearance pursuant to Section 5 of the Voting Rights Act. Reported at 615 F.2d 1023. (Petition for Certiorari, Appendix, p. A-26).

(5) Order of the District Court, dated April 30, 1980, denying respondents' motion to enjoin the conduct of the May 3, 1980 primary election of county commissioners in Kleberg County. (Petition for Certiorari, Appendix, p. A-31).

(6) District Court's Order entered June 20, 1980, directing petitioners to immediately begin Section 5 preclearance procedure pursuant to the Opinion Order of the Court of Appeals. (Petition for Certiorari, Appendix, p. A-34).

JURISDICTION

This Court has jurisdiction to review the opinion of the United States Court of Appeals for the Fifth Circuit pursuant to the provisions of Title 28 U.S.C. § 1254.

The opinion of the Court of Appeals was rendered on April 14, 1980, (Petition for Certiorari, Appendix, p. A-26) and the mandate was issued on April 25. (Petition for Certiorari, Appendix, p. A-30). A petition for rehearing and for rehearing en banc was overruled on May 12, 1980. (Petition for Certiorari, Appendix, p. A-33). The petition for certiorari was filed on August 6, 1980, and was granted on October 14, 1980.

STATUTE INVOLVED

42 U.S.C. 1973(c):

> Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court, appeal to Supreme Court.
>
> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or pre-

requisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure. *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to

enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

As amended Pub.L. 94-73, Title II, §§ 204, 206, Title IV, § 405, Aug. 6, 1975, 89 Stat. 402, 404.

STATEMENT OF THE CASE

In Texas the Commissioners Court is the governing body of a county. Tex. Rev. Civ. Stats., Art. 2351. It consists of a county judge and four commissioners. Tex. Constitution, Art. 5, § 18. The county judge is elected countywide. One county commissioner is elected from each of four commissioners' precincts into which the county has been divided pursuant to state law, and serves for a term of four years. Tex. Rev. Civ. Stats., Art. 2351. The terms are staggered; two commissioners are elected every two years.

This class action, filed on January 26, 1978, asserted that the populations of the four commissioners precincts of Kleberg County, Texas were so unequal as to violate the constitutional one man, one vote principle and, in addition, that the existing boundary lines of the four precincts divided Mexican-Americans and Anglos in such

a fashion as to unconstitutionally dilute the voting strength of Mexican-Americans. (Plaintiffs' First Amended and Supplemental Complaint, R.__). Among the relief sought in the Prayer was a judgment "granting plaintiffs: . . . (d) the adoption" of a new election plan.

Jurisdiction in the trial court was based upon the provisions of 28 U.S.C. 1343 (3) and (4) which give a United States District Court original jurisdiction of all suits brought pursuant to 42 U.S.C. 1983 to redress deprivation under color of state law of any right, privilege or immunity secured by the Constitution of the United States.

After a trial on the merits the district court concluded that reapportionment was necessary to correct population disparities, but found that there had been no dilution of the voting strength of Mexican-Americans. The court "directed" the defendants* to file and serve upon the plaintiffs by November 13, 1979 a proposed new plan; a hearing on the new plan was scheduled for and conducted on December 10, 1979. (Memorandum and Order of October 2, 1979; Petition for Certiorari, Appendix, p. A-1).

Plaintiffs filed no objection to the order, to the proposed procedure, nor to the reapportionment plan which was served upon them and filed with the court as directed. They appeared for the December 10 hearing prepared to attack the plan with expert testimony challenging the manner in which the plan distributed Mexican-Americans among the four precincts (J.A. 13) and, for the first

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* The parties will henceforth be referred to as they were in the trial court: the petitioners-county officials were defendants and respondents were plaintiffs.

time, orally objected to the plan because it had not been precleared under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c). (J.A. 10, 11)

The evidence heard by the Court on December 10 established that the plan submitted to the Court had been prepared by Dr. Robert T. Nash, Dean of the Business School at Texas A&I University. (J.A. 14) Nash had been given no instructions by the defendants other than that he was to draw commissioners precinct boundary lines which would achieve equality of population. (J.A. 25, 26) He received no directions from the commissioners on boundaries, thoroughfares, ethnic distribution or the like. (J.A. 26, 28-29, 31-32) Their only input was a request that a line be changed so as to include the courthouse and its justice of the peace in a different precinct from the one selected by Nash; the change did not affect population distribution. (J.A. 28)

The testimony of Dr. Nash and County Judge W. C. McDaniel established beyond cavil that the new apportionment plan was not prepared for the purpose of denying or abridging anyone's right to vote on account of race or color. Equal division of the 1970 census population among the four commissioners' precincts, without regard to ethnic ratios, was the sole objective. (J.A. 17-18; 21; 27; 28; 33-35) Although plaintiffs explored the subject carefully with each of these witnesses and their own expert, nothing in the record remotely suggested that the new plan was designed to or did impact adversely on any minority group. (J.A. 43-44; 46)

Dr. Stanley Bittinger, the witness who had analyzed the new plan on behalf of the plaintiffs, testified to facts which demonstrated that the new plan, regardless

of intent, in fact did not dilute or adversely affect minority voting rights. (J.A. 50-68) He compared the ratios of Mexican-American to Anglo populations of the proposed commissioners' precincts with the ratios which existed under the old plan which had been invalidated by the court. (Plaintiffs' Exs. 1 and 2, J.A. 77, 78) His testimony supported the conclusion that compared to the plan previously employed by the county, the new plan did not effect substantial changes in Mexican-American voting strength. Under the old plan, Precinct 4 contained a large Mexican-American majority which was decreased slightly, from 96% to 91%, by the new plan. (J.A. 55; Plaintiffs' Exs. 1, 2, J.A. 77, 78) The Anglo population of Precinct 3 increased from 68% to 76% with a corresponding decrease in the Mexican-American population; in Precinct 2 the Anglo population decreased from 69% to 60% with a corresponding increase in Mexican-American population; and in Precinct 1 the Anglo population increased from 59%to 72% while the Mexican-American population decreased from 40% to 24%. (Plaintiffs' Exs. 1 and 2, J.A. 52, 53-54, 77-78) Bittinger agreed that the proposed change of ratio in Precinct 3 represented what he described as a "slight shift." (J.A. 55-56) He conceded that given the number of Mexican-American residents in Precincts 2 and 3 under the new plan, multiple candidates for county commissioner would necessarily be concerned with soliciting the Mexican-American vote in each. (J.A. 56; 58-59)

Other questions of Bittinger concerning the impact of the new apportionment plan on Mexican-Americans dealt with the size of Mexican-American families (J.A. 61), the number of additional persons who would have reached voting age since the date of the 1970 census upon which

the statistics were based (J.A. 61-63), and demographic changes in the county which had occurred in the ensuing nine years (J.A. 63-65).

It was undisputed that the Commissioners Court had not adopted the plan which Nash prepared, nor otherwise purported to reapportion itself; it had merely voted that the plan be submitted to the Court for its action thereon, as ordered. (J.A. 40) Formulated in December, as it was, the plan was one which the Commissioners Court was prohibited by state law from adopting since it altered the makeup of the county's voting precincts. (J.A. 18, 19); Tex. Election Code, Art. 2.04(1). As the Court of Appeals specifically acknowledged, the Commissioners Court did nothing more than "[review] Dr. Nash's work and officially [adopt] his proposal *as the plan it would submit to the district court.*" (Fifth Circuit Opinion, Petition for Certiorari, Appendix, p. A-27). (Emphasis added).

After considering the evidence offered by all parties, the district court concluded that the new plan remedied the malapportionment previously found. Relying on *East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), the court held that the plan was court-ordered rather than legislative and that it was therefore not subject to the preclearance provisions of Section 5 of the Voing Rights Act; it ordered that "the 1980 primary and general elections should be conducted" thereunder. (District Court's Order of January 10, 1980; Petition for Certiorari, Appendix, p. A-23)

Dissatisfied because the trial court did not require preclearance of the plan under Section 5 of the Voting Rights Act, the plaintiffs perfected an appeal to the

Court of Appeals for the Fifth Circuit and, in connection therewith, requested a summary reversal or, in the alternative, an injunction against the conduct of the scheduled May, 1980 election of two county commissioners pursuant to the plan.

In a *per curiam* opinion dated April 14, 1980, a panel of the Fifth Circuit, citing only *Wise v. Lipscomb,* 437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978), and with no mention at all of *East Carroll Parish,* held that the plan was legislative, that it required Section 5 preclearance, and that the "district court erred in considering the constitutionality of the proposed plan." It vacated the trial court's order and remanded the case on April 14, notwithstanding that the primary election was scheduled for May 3. (Fifth Circuit's Opinion; Petition for Certiorari, Appendix, p. A-26)

Defendants promptly moved for a rehearing and a rehearing en banc. While the motion was pending, plaintiffs requested the trial court to enjoin the imminent primary election. The trial court permitted the election to proceed, but enjoined announcement of the results. (Order of April 30, 1980; Petition for Certiorari, Appendix, p. A-31)

On May 12, 1980, the Fifth Circuit denied defendants' petition for rehearing. (Letter Notice; Petition for Certiorari, Appendix, p. A-33) Plaintiffs returned to the trial court once again, this time to seek an order directing defendants to commence Section 5 preclearance procedures immediately. Defendants responded that such an order would render moot their petition to this Court for certiorari. After hearing evidence and argument, the trial court directed defendants to commence preclearance pro-

cedures "immediately." (Order of June 20, 1980; Petition for Certiorari, Appendix, p. A-34)

A requested stay of the Fifth Circuit's mandate was granted by Mr. Justice Powell on August 14, 1980. Thereafter, by agreement of the parties, orders were entered permitting inclusion on the November, 1980 general election ballot of the names of the successful primary election candidates for commissioner and constable, with the proviso that their election to office would be invalidated automatically should this Court affirm the holding of the Court of Appeals. (District Court Orders of September 25 and 30, 1980; R. 8).

SUMMARY OF THE ARGUMENT

From the standpoint of precedent alone, the result in this case is dictated by *East Carroll Parish School Board v. Marshall, supra,* rather than *Wise v. Lipscomb, supra.* In *East Carroll Parish,* this Court held that on facts identical to those here presented, Section 5 preclearance of a new apportionment plan was not required. *Wise v. Lipscomb* is not controlling, both because of the difference in facts and because it was directed to the propriety of the use in a reapportionment plan of at-large or single-member districts rather than the need for Section 5 preclearance. Here the trial court properly distinguished *East Carroll Parish* from *Wise;* the Court of Appeals failed even to discuss *East Carroll Parish.*

Should the Court disregard precedent and undertake a construction of the Voting Rights Act, the result still should be a conclusion that Section 5 preclearance of the plan in question was not required. The trial court was exercising its equitable jurisdiction to provide a prompt

and effective remedy in a suit not based on the Voting Rights Act, in which it had already invalidated the existing plan under which elections in the county might otherwise have been conducted. Since the Act neither speaks to nor contemplates the requirement of Section 5 preclearance under such facts, construction is required. A statute should not be construed to limit the equitable jurisdiction of a court unless it expressly so provides or unless such a construction is a necessary and inescapable inference. Neither situation exists here.

Section 5 should not be construed to require preclearance here because of the absence of a factual circumstance, the assumed existence of which is fundamental to Section 5. Section 5 contemplates the existence, pending preclearance, of a present plan under which elections may be conducted while the preclearance procedure runs its course. It is directed to prospective, voluntary departures from an existing usable plan. Where there is no such plan, no elections can be held until preclearance has been accomplished. Voters are effectively disenfranchised; officials elected under an unconstitutional plan remain in office. This potential for delay and disruption was precluded here. A new, constitutional, and non-discriminatory plan was prepared, reviewed by the court in an adversary proceeding, and ordered into effect within three months. Had the court been required to withdraw from the case after it had determined the existing plan to be unconstitutional, the county might have made Section 5 preclearance procedures a vehicle for indefinite delay and the perpetuation in office of officials elected under the plan which the court had held unconstitutional.

Section 5 was designed to provide scrutiny by a federal authority—to insure a "federal presence"—in the formu-

lation of new voting procedures before they were put into effect, rather than after, and to eliminate after-the-fact, time consuming litigation as the only means of relief. The Act serves these purposes when the plan is voluntary. When the new plan is reviewed and ordered into effect in a pending suit, however, in which the jurisdiction of the court is not dependent on the Voting Rights Act, no further "federal presence" is necessary and the threat of delay is absent. The procedure was not prescribed because local federal district courts lacked the ability or time to search out and eliminate discrimination in new voting plans, but because they usually did not have the opportunity to do so before the new plan had been adopted. Here the district court had that opportunity. A requirement of further scrutiny pursuant to Section 5 would serve no useful purpose, and would lead to the delay the Act was designed to avoid.

Finally, by its very terms the Act does not apply to a plan summoned up, reviewed, and ordered into effect by a federal court. Section 5 prohibits use without preclearance of only those changes in voting procedure which a political subdivision "enact[s] or seek[s] to administer." A county neither "enacts" nor "seeks to administer" a voting plan which it has been *ordered* to use by a federal court.

ARGUMENT

The Court may choose from a number of alternatives in deciding whether a district court, whose jurisdiction has been properly invoked on a basis other than the Voting Rights Act by private citizens who seek an order "granting . . . the adoption" of a new election plan, and

which has struck down an existing apportionment, may assess and order into effect a new plan which has not been precleared under Section 5 of the Voting Rights Act. The Court may follow its own clear holding in *East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), that under facts identical to those here present, preclearance is not required. It may select from the variety of rationales represented by the composite majority in *Wise v. Lipscomb,* 437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978), under any of which Section 5 preclearance of the plan in question was not required. Or it may reassess the purpose underlying the enactment of Section 5, which should likewise dictate the conclusion that a new plan, generated under the circumstances here present, is not the type to which the preclearance requirements of Section 5 were directed.

1. ON THE BASIS OF PRECEDENT, SECTION 5 PRECLEARANCE OF THE PLAN WAS NOT REQUIRED

The earliest address by the Court to the question of the need for preclearance of a plan spawned during litigation and the product of a federal court action was *Connor v. Johnson,* 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971). There, the district court had ordered into effect its own election plan. An application that the implementation of the plan be stayed because the plan had not been submitted for Section 5 preclearance was denied with the terse explanation: "A decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act." 402 U.S. at 691, 91 S.Ct., at 1762.

The question was next considered in *East Carroll Parish, supra*, in which a police jury and school board, held to be malapportioned to an unconstitutional degree, prepared and filed a reapportionment plan pursuant to court order. The trial court approved the plan as submitted. Dissatisfied parties appealed from that order on the ground that it diluted the black vote. When the case reached this Court the United States filed an *amicus* brief in which it argued that Section 5 preclearance was required before adoption by the district court of a reapportionment plan submitted to it on behalf of a local legislative body that was covered by the Act. The contention was disposed of in the following language:

> [C]ourt-ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by § 5. Had the East Carroll police jury reapportioned itself on its own authority, clearance under § 5 of the Voting Rights Act would clearly have been required. *Connor v. Waller*, 421 U.S. 656, 95 S.Ct. 2003, 44 L.Ed.2d 486 (1975). However, in submitting the plan to the District Court, the jury did not purport to reapportion itself in accordance with the 1968 enabling legislation, see n. 2, *supra*, and statutes cited therein, which permitted police juries and school boards to adopt at-large elections. . . . Moreover, since the Louisiana enabling legislation was opposed by the Attorney General of the United States under § 5 of the Voting Rights Act, the jury did not have the authority to reapportion itself. * * * Since the reapportionment scheme was submitted and adopted pursuant to court order, the pre-clearance procedures of § 5 do not apply. *Connor v. Johnson*, 402 U.S. 690, 691, 91 S.Ct. 1760, 1761, 29 L.Ed.2d 268, 270 (1971).

424 U.S., at 639 n. 6, 96 S.Ct., at 1085 n. 6 (1976).

Precisely the same circumstances existed in the instant case. When the County's existing plan was struck down, petitioners submitted a plan in obedience to a court order to do so; they did not presume to reapportion the county "on their own authority." And they were prohibited by state law from reapportioning the county in the manner in which it was done, at the time the plan was prepared, since it altered voting precincts in the county (J.A. 18-19). Such changes may be made only during a July or August term. Texas Election Code, Article 2.04(1). The Texas courts have construed this provision to mean that the Commissioners Court has no authority to redraw election precinct boundary lines in any month other than those specified. *Wilson v. Weller,* 214 S.W.2d 473 (Tex. Civ. App. 1948, no writ).

Given the congruence of the facts, a reapportionment plan generated as the one in question was, reviewed and ordered into effect by the trial court, did not require Section 5 preclearance if the pronouncement in *East Carroll Parish* is still the law.

In *Morris v. Gressette,* 432 U.S. 491, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977), additional light was shed on which plans must be precleared and which need not be. The determining factor appeared to be the authority pursuant to which the new plan was adopted:

> This Court held in *Connor v. Waller,* 421 U.S. 656, 95 S.Ct. 2003, 44 L.Ed.2d 486 (1975), that reapportionment legislation adopted by the legislature on its own authority in the course of litigation is not effective in a covered jurisdiction until after compliance with § 5's preclearance review provisions. (Such legislation is to be distinguished from a "reapportionment scheme . . . submitted and adopted

> pursuant to court order," for which preclearance is not required. *East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 638 n. 6, 96 S.Ct. 1083, 1085, 47 L.Ed.2d 296 (1976).

432 U.S., at 496 n.8, 97 S.Ct., at 2416 n.8. In *Connor v. Waller, supra,* of course, the plan at issue was truly adopted by a legislature which was acting independently, although a court proceeding happened to be pending at the time; it is only in the sense of contemporaneousness that the plan was adopted "in the course of litigation."

The basis for determining the necessity for Section 5 preclearance—the authority pursuant to which the plan was adopted—seemed to be firmly resolved until the decision in *Wise v. Lipscomb,* 437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978). In *Wise* the at-large system of electing Dallas City Council members was held to unconstitutionally dilute Negro voting strength. The City submitted a new plan which called for the election of eight council members from single-member districts and the election at-large of three members, including the mayor. The trial court approved the plan. The Court of Appeals reversed, 551 F.2d 1043 (1977), holding that only single member districts should be employed in what it concluded was a "judicially imposed" reapportionment plan.

Texas was not subject to the Voting Rights Act at the time the case was pending in the trial court, and this Court expressly acknowledged that the question whether the plan required Section 5 preclearance was not present. Since only the permissibility of employing at-large districting was involved, the reasoning of the Court does not resolve the question presented here; and even if it

were pertinent, it would require a conclusion that the county's plan was "court-ordered."

Justices White and Stewart apparently based their conclusion that the plan was legislative on their view that the Dallas City Council had reapportioned itself voluntarily rather than merely submitting the reapportionment plan to the court before adopting it. In the instant case the Commissioners Court did not adopt the plan for implementation but only "adopted (Nash's) proposal as the plan it would submit to the District Court." (Fifth Circuit's Opinion; Petition for Certiorari, Appendix, p. A-27) They likewise placed emphasis on the fact that the Dallas City Council, unlike the *East Carroll* police jury, was not precluded by statute from reapportioning itself. In this respect the instant facts more closely resemble those in *East Carroll Parish* than *Wise* because the Commissioners Court was not free to adopt the plan in question.

In a concurring opinion Mr. Justice Powell, joined by the Chief Justice and Justices Blackmun and Rehnquist, stated that the essential consideration which rendered the Dallas City Council's plan legislative was that "the Dallas City Council exercised a legislative judgment, reflecting the policy choices of the elected representatives of the people, rather than a remedial directive of a federal court." ____ U.S., at ____, 98 S.Ct., at 2501. In the present case it could scarcely be said that a mathematical redistribution of Kleberg County's 1970 census population by a college professor was the exercise of legislative judgment which reflected the policy choices of elected representatives, rather than the remedial directive of a federal court. The trial court had held that there had been

no discrimination or dilution of minority voting strength, but had invalidated the county's existing apportionment because it was not mathematically acceptable. The trial court did not "invite" the submission of a new plan, it "directed" that a plan be prepared and submitted. (District Court's Memorandum and Order of October 2, 1979; Petition for Certiorari, Appendix, p. A-19) It did not leave the matter of whether to implement the plan to the legislative judgment of the county officials, it "ordered" that the 1980 primary and general elections be conducted pursuant thereto. (District Court's Order of January 10, 1980; Petition for Certiorari, Appendix, p. A-23) So, even if the considerations determinative of the permissibility of using at-large districting in a reapportionment plan also determined the need for Section 5 preclearance, it would appear that these four justices who concurred in the result reached in *Wise* that the plan there under consideration was legislative because a product of legislative judgment should agree that the plan in the instant case was court-ordered, and not subject to the requirement of § 5 preclearance.

Finally, Mr. Justice Marshall, joined by Justices Brennan and Stevens, dissented from the majority judgment in *Wise* on the ground that they saw no distinction between the facts there and those before the court in *East Carroll Parish*. They would have held the plan to be court-ordered, and on the same grounds would undoubtedly consider the instant plan court-ordered, contrary to the holding of the Fifth Circuit.

From the standpoint of precedent alone, the trial court here did not err in concluding that because the county reapportionment plan before it was "court-ordered," Section 5 preclearance was not required.

2. PRECEDENT ASIDE, SECTION 5 OF THE VOTING RIGHTS ACT SHOULD NOT BE CONSTRUED TO DEPRIVE A DISTRICT COURT OF JURISDICTION TO REVIEW AND ORDER A NEW APPORTIONMENT PLAN INTO EFFECT WHEN THE PREVIOUS PLAN HAS BEEN INVALIDATED.

a. The purpose and operation of the Voting Rights Act and Section 5

The underlying purpose and history of the Voting Rights Act of 1965, 79 Stat. 437, are treated in detail in *State of South Carolina v. Katzenbach,* 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966); *Allen v. State Board of Elections,* 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed. 2d 1 (1969); and *United States v. Board of Commissioners of Sheffield, Alabama,* 435 U.S. 110, 98 S.Ct. 965, 55 L.Ed.2d 148 (1978). The Act was amended and extended in 1970, 84 Stat. 314, and again in 1975, 89 Stat. 400.

Racial discrimination in voting was the target of the Act. "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *State of South Carolina v. Katzenbach, supra,* 383 U.S., at 309; 86 S.Ct., at 808. Congressional attempts to cope with the problem by facilitating case-by-case litigation had accomplished little because voting rights suits were onerous to prepare, because the trial process afforded great opportunity for delay, and because when favorable decisions were obtained, certain states simply switched to new discrimina-

tory devices. *Id.*, 383 U.S., at 313-314; 86 S.Ct., at 810-811. The new Act was designed to strengthen existing remedies, to provide additional stringent remedies, and to suspend discriminatory practices such as literacy tests and other voting qualifications. *Id.*, 383 U.S., at 315-316; 86 S.Ct., at 812. To prevent erosion of the progress which *had* been made, Section 5 of the Act "suspend[ed] new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment," a procedure acknowledged to be "an uncommon exercise of congressional power." *State of South Carolina v. Katzenbach, supra,* 383 U.S., at 334; 86 S.Ct., at 822. The prohibition against instituting new voting procedures without approval of a federal authority "is not dependent upon proving past unconstitutional [action]; the Act is aimed at preventing the use of new procedures until their capacity for discrimination has been examined by the Attorney General or by a court." *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 157, 97 S.Ct. 996, 1005, 51 L.Ed.2d 229 (1977).

Two methods of "scrutiny" or preclearance are prescribed by the Act. A covered state or political subdivision may file suit in the District Court for the District of Columbia for a declaratory judgment that the proposed change in procedure is not being enacted for the purpose of racial discrimination and does not have that effect. *Perkins v. Mathews,* 400 U.S. 379, 91 S.Ct. 431, 21 L.Ed.2d 476 (1971); *Allen v. State Board of Elections, supra.* Alternatively, it may submit the proposed plan to the Attorney General, a procedure this Court has concluded was designed to give a covered state "a rapid method of

rendering a new state election law enforceable," *Allen v. State Board of Elections, supra,* 393 U.S., at 549; 89 S.Ct., at 823, because of the provision that the change may be implemented if the Attorney General does not object within a period of sixty days following receipt of all pertinent information. This method of preclearance was added to the Act without mention in committee reports or debates. *Morris v. Gressette,* 432 U.S. 491, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977). Procedure for review by the Attorney General is set out in 28 C.F.R. Part 51.

Although the Attorney General's objection or failure to object to a submitted change is not subject to judicial review, the two methods of preclearance are not mutually exclusive; if the Attorney General objects to a proposed change, the political subdivision may nonetheless seek a favorable declaratory judgment from the District Court for the District of Columbia. *Morris v. Gressette, supra.* The burden of proof in either type of preclearance proceeding is on the political subdivision. *City of Richmond, Virginia v. United States,* 422 U.S. 358, 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975). The only penalty for failure to sustain the burden is that the requested change may not be made.

By the express terms of the Act, only a state or a political subdivision may seek a declaratory judgment from the District Court for the District of Columbia that the proposed change has no discriminatory purpose or effect. A private citizen is limited to asking a local district court for a declaratory judgment that a new state enactment is in fact governed by Section 5, and if it is, for an injunction against further enforcement pending the state's submission

of the enactment for preclearance. *Allen v. State Board of Elections, supra.*

The authority of Congress to limit jurisdiction of Section 5 declaratory judgment actions to the District Court for the District of Columbia has been rationalized on the ground that such a suit is a suit against the federal government. *Allen v. State Board of Elections, supra.* That court alone may determine whether a covered change in election laws was enacted for a discriminatory purpose or would have a discriminatory effect. *Perkins v. Mathews, supra.*

Review of a plan by the Attorney General, however, is limited to a determination whether the change will "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States,* 425 U.S. 130, 141, 96 S.Ct. 1357, 1364, 47 L.Ed.2d 629 (1976). The Attorney General may not determine whether covered changes are constitutional.

The Act specifically provides that even after a favorable declaratory judgment by the District of Columbia Court or approval by the Attorney General, either express or in the form of failure to object, private litigants may still file suit in a local district court to challenge the constitutionality of the precleared plan.

Finally, the Act gives neither the Attorney General nor the District of Columbia federal court jurisdiction to order that specific changes be made or to implement plans of their own. Their function under the Act is solely one of review of what the State elects to submit.

b. Traditional rules of statutory construction do not warrant a conclusion that Section 5 impairs the equitable jurisdiction of a court to provide a complete remedy when it has invalidated an existing apportionment.

Nothing in the language of the Voting Rights Act suggests or requires a holding that when a district court has been asked by private citizens to remedy an unconstitutional election plan presently in use, pursuant to jurisdiction derived by the court from a source other than the Voting Rights Act, the court, in the exercise of its equitable jurisdiction, may not fashion a complete remedy.

The Court is called upon to construe the Act, since the subject at hand lies beyond any direct expression contained in its text. *United States v. Farenholt,* 206 U.S. 226, 27 S.Ct. 629, 51 L.Ed. 1036 (1907). In determining the scope of the Act, the Court may look to the reasons for its enactment. *Stonite Products Co. v. Melvin Lloyd Co.,* 315 U.S. 561, 62 S.Ct. 780, 86 L.Ed. 1026 (1942). The history of the statute, its original purpose, and its current status may be considered; a construction which would frustrate the purpose of the Act is to be avoided. *United States v. Bryan,* 339 U.S. 323, 70 S.Ct. 724, 94 L.Ed. 884 (1950), reh'g. den., 339 U.S. 991, 70 S.Ct. 1018, 94 L.Ed. 1391 (1950). While committee reports may be resorted to, *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 62 S.Ct. 523, 86 L.Ed. 726 (1942), they are not binding on the court. See *National Labor Relations Board v. Lion Oil Company,* 352 U.S. 282, 77 S.Ct. 330, 1 L.Ed.2d 331 (1957); *Commissioner of Internal Revenue v. Rabenold,* 108 F.2d 639 (2nd Cir. 1940). The Court is obligated to consider the consequences of varying possible con-

structions, and should adopt the one which will avoid objectionable results. *Brooks v. United States,* 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949).

The sole express support for an argument that the trial court had no power to order a new election plan into effect, under the circumstances here pertaining, is found in Senate Report No. 94-295, U.S. Code Cong. and Admin. News 1975. Commencing at page 784, the Senate Judiciary Committee referred to the holding of this Court in *Connor v. Waller,* 421 U.S. 656, 95 S.Ct. 2003, 44 L.Ed.2d 486 (1975), and to the handling of a Section 5 preclearance question in *Gaillard v. Young* (Civil Action No. 74-1265, D. South Carolina, 1975) which involved facts identical to those in this case. The Committee said that in its view, when a federal district court has held unconstitutional an apportionment plan of a covered political subdivision, "the court should defer its consideration of—or selection among—any plans presented to it until such time as these plans should have been submitted for Section 5 review." It construed the opinion in *Connor v. Johnson, supra,* to relate only to plans fashioned by the court itself "because of exigent circumstances." The holdings in these cases were deemed by the Committee to be "consistent with the Committee's objective to utilize a form of primary jurisdiction for Section 5 review under which courts dealing with voting discrimination issues should defer in the first instance to the Attorney General or to the District of Columbia District Court." Neither the report of the House Judiciary Committee, Report No. 94-196, May 8, 1975, nor any of the myriad other House or Senate committee reports published from the inception of the Act in 1965, through its extension in 1970, to the present, contains language suggesting such a result.

Notwithstanding the quoted language and construction *cum* legal opinion, the Act does not, by plain words or necessary inference, purport to divest a local federal district court of jurisdiction to formulate a complete remedy, once its jurisdiction has been invoked in the first instance on a basis other than the Voting Rights Act, and a solitary committee report cannot mandate that which the language of the Act does not.

Porter v. Warner Holding Co., 328 U.S. 396, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946) delineates the equitable jurisdiction pursuant to which the trial court below was authorized to and did act. After noting that the court's jurisdiction had been invoked to grant injunctive relief, this Court stated:

> Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. Virginian Ry. Co. v. System Federation, 300 U.S. 515, 552, 57 S.Ct. 592, 601, 81 L.Ed. 789. Power is thereby resident in the District Court, in exercising this jurisdiction, 'to do equity and to mould each decree to the necessities of the particular case.' *Hecht Co. v. Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 592, 88 L.Ed. 754. . . . [T]he court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever issues and give whatever other relief may be necessary under the circumstances.
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> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative demand. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful construction.' Brown v. Swann, 10 Pet. 497, 503, 9 L.Ed. 508. See also Hecht Co. v. Bowles, supra, 321 U.S. 330, 64 S.Ct. 592.

328 U.S., at 398; 66 S.Ct., at 1089.

Included within the equitable jurisdiction which is not to be denied a district court absent the clarity or inescapable necessity spoken to, is the duty to enter a decree which will prevent a multiplicity of actions, *Joseph Parker Kemp v. Boyd,* 229 U.S. 530, 33 S.Ct. 785, 57 L.Ed. 1317 (1913), one which will completely determine the controversy before the court. *Stonega Coke & Coal Co. v. Price,* 116 F.2d 618 (4th Cir. 1940), *cert. den.,* 308 U.S. 618, 60 S.Ct. 263, 84 L.Ed. 516 (1939). "The approved policy in equity cases is to settle all the rights of the several parties. *Riddle v. Mandeville,* 5 Cranch 322, 3 L.Ed. 114." *National Cash Register Co. v. Dallen,* 76 F.2d 867, 868 (3rd Cir. 1935).

These principles were applied in factually analogous circumstances in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). School authorities had argued that the equity powers of federal district courts had been limited by Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c, Section 2000c-6 of which provided "nothing herein shall

empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to ensure compliance with constitutional standards." This Court said there was no suggestion in the statutory language of an intention "to restrict those powers or withdraw from courts their historic equitable remedial powers." 402 U.S., at 17, 91 S.Ct., at 1277. There is nothing in the Voting Rights Act which suggests an intention to restrict the power of a local district court to review and order into effect a plan designed to remedy constitutional defects in and to supplant an existing plan which the Court has held may be used no longer.

As hereafter demonstrated, a construction of the Act in a manner which would divest the district court of jurisdiction to order a new apportionment plan into effect, given the present circumstances, is inconsistent with a basic presumption upon which the Act is based, and would thwart rather than further the objectives of the Act.

c. Section 5 is directed to voluntary changes in voting procedures, during the preclearance of which a present election plan remains in effect.

A principal reason for construing Section 5 not to apply to a plan developed under the present circumstances lies in congressional and court statements reflecting the assumption of a fact not present here—the existence of a currently usable plan. The assumption is expressed in

terms of "freezing": "[Section 5] of the Voting Rights Act essentially freezes the election laws of the covered States unless a declaratory judgment is obtained in the District Court for the District of Columbia holding that a proposed change is without discriminatory purpose or effect." *Georgia v. United States,* 411 U.S. 526, 538, 93 S.Ct. 1702, 1709, 36 L.Ed.2d 472 (1973). *Beer v. United States, supra,* refers to the same "freezing" concept as expressed in a committee report:

> Congress therefore decided, as the Supreme Court held it could, 'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes can be shown to be non-discriminatory.' H.R. Rep. No. 94-196, pp. 57-58.

425 U.S., at 140; 96 S.Ct., at 1363.

Existing election procedures cannot be frozen in effect where, as here, a local federal court with unquestionable jurisdiction of the matter has already told the county it may no longer use the existing election plan.

No particular mischief or hardship results from construing Section 5 to prohibit the *voluntary* employment of a new voting plan until it has been precleared, because the political subdivision may continue to hold elections under an old plan during the pendency of the preclearance procedure. Continued use of the old plan does not constitute the retrogression which Section 5 was designed to prevent, and pursuit of preclearance, even in a District of Columbia court, would not interfere with the conduct of statutorily scheduled elections. Where the old plan no longer exists, however, different results accrue. The rights of the voters, minorities included, are not just

subject to retrogression, they are denied completely during the time it takes to preclear the proposed plan.

A political subdivision which voluntarily undertakes enactment of a new plan does not run the risk of disenfranchising its residents during any prolonged period of preclearance, but a county whose plan has already been struck down does. And where, as in Texas, present county commissioners continue to serve until their successors are duly elected, Tex. Constitution, Art. 5, § 18, a political subdivision may perpetuate indefinitely the tenure of officials elected pursuant to an unconstitutional plan if the local court must remit the subdivision to the delay which preclearance under the Voting Rights Act makes possible.

To this suggestion might come the response that both a Senate committee and this Court have recognized the authority of the trial court to order a plan into effect without preclearance, under exigent circumstances. But from whence in Section 5 does such jurisdiction derive? The Act is silent on the subject. Either the Act leaves the court no jurisdiction to order the county to administer *any* new plan which has not been precleared, including one prepared by the court, or it does have jurisdiction to forego preclearance when there is no other useable plan. The Act does not lend itself to a construction that the district court has a sort of partial jurisdiction.

Is the question then not one of jurisdiction, but of abuse of discretion? If it is, there certainly was no abuse of discretion by the trial court under the facts here applicable.

If the court may order a temporary plan into effect to meet the exigencies of the moment, may it be a plan

prepared by the county and only reviewed by the court? Without preclearance? Or must the court roll up its robe sleeves and draft the interim plan from scratch to avoid the need for preclearance? Or may the county submit an almost but not quite perfect plan which, when corrected in small detail by the court, may be used because it is thereby the court's and not the county's?

The possibilities are countless and avoidable if Section 5 is given the practical construction that a plan such as the instant one need not be precleared.

d. Requiring Section 5 preclearance when the trial court has invalidated an existing plan will permit rather than prevent delay in achieving constitutional apportionment.

The suggestion that requiring Section 5 preclearance will expedite rather than delay the adoption of a new voting procedure has verity when the new procedure is a voluntary one, one which the political subdivision *desires* to make. It is a slower process, though, when the subdivision is already in litigation, and it may be made a device for delay, if the subdivision wishes.

In the instant case, the new apportionment plan was prepared, presented, scrutinized in an adversary hearing, and ordered into effect within three months of the time the old plan was struck down. Such a prompt remedy was possible because the trial court was already familiar with the underlying facts, had control of the parties, and established a brisk schedule.

Compare that dispatch with the delay the Voting Rights Act makes possible to a political subdivision so inclined, if the trial court were required to withdraw

once it had held the existing plan unconstitutional. Officials with whom the subdivision is satisfied, frequently defendants themselves, elected under an unconstitutional plan, remain in office until a new plan has been precleared. There is no previous plan frozen into effect pending preclearance. Knowing that delay will perpetuate them in office, they submit an artfully unacceptable plan to the Attorney General. Upon rejection, the plan might be revised and resubmitted in a still unacceptable form. When rejected again, suit could be filed in the District of Columbia court, since Attorney General denial of preclearance does not preclude a subsequent suit in the District of Columbia for approval of the same plan. If resort to the District of Columbia court is the route chosen by the county, then there arises that multiplicity of suits which the rules of statutory construction and the equitable jurisdiction of the court should avoid. Appeal to the Supreme Court might follow. These peregrinations are possible because neither the Attorney General, nor, apparently, the District Court for the District of Columbia, has authority under Section 5 to do more than disapprove.

Once precleared by either method the plan then might be attacked by private citizens in the local district court on the grounds of unconstitutionality. Should the local district court determine the new, precleared plan to be unconstitutional, then the same time-consuming preclearance procedures would commence all over again.

To this scenario the response might be that the trial court (local or District of Columbia?) has authority to enter orders to expedite the county's pursuit of preclearance, or to order a temporary plan into effect. What a wasteful, needless procedure, compared to what occurred here. And in implementing even a temporary plan, if it

needed to, could the trial court employ one prepared by the county but not precleared?

In short, construction of the Voting Rights Act to require Section 5 preclearance of a plan prepared at the instance of and reviewed by a local district court, when there is no usable existing plan, would make possible those consequences which the Court could and should avoid by a contrary construction. *Brooks v. United States, supra.*

e. "Legislative" or "court-ordered": Section 5 only speaks to voluntarily enacted and implemented election plans.

Justice Frankfurter observed that: "[T]he phrase . . . is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas." *Tiller v. Atlantic Coastline R. Co.*, 318 U.S. 54, 68, 63 S.Ct. 444, 452, 87 L.Ed. 610 (1942). So it also is with labels. Section 5 applicability cannot be determined by resort simply to cases in which plans have been labeled "court-ordered" or "legislative," for these terms have been employed most frequently in cases in which the issue was the substantive acceptability of a reapportionment. *E.g., Wise v. Lipscomb, supra; Chapman v. Meier,* 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1977); *Mahan v. Howell,* 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973). Plans prepared by a court are subject to stricter requirements as to equality of population distribution and the use of single member districting, than are "legisla-

tive" plans. *Chapman v. Meier, supra; Connor v. Finch,* 431 U.S. 407, 414, 97 S.Ct. 1828, 1833, 52 L.Ed.2d 465 (1977).

The same plan may be "legislative" for substantive purposes, but "court-ordered," in the *East Carroll Parish* sense, when the need for Section 5 preclearance is the inquiry. If the issue before an appellate court is the permissible disparity in division of population, or whether single member or at-large districts may be used, the inquiry is whether the disparity of population or the choice of districting represents a policy decision permitted to a political subdivision but not to a federal court. When the issue is the need for Section 5 preclearance, the primary concern is whether the plan requires federal scrutiny to insure the absence of retrogression or discriminatory purpose and effect. If a plan has already been reviewed and ordered into effect by a federal authority, a district court which has properly acquired jurisdiction, it is "court-ordered" and Section 5 preclearance should not be required.

A report accompanying the five-year extension of the Voting Rights Act in 1970 explained:

> Section 5, similar to the authority to assign examiners and observers, assures a Federal presence and provides an important safeguard that new subterfuges will be promptly discovered and enjoined.

House Report No. 91-397, U.S. Code and Cong. Admin. News 1970, p. 3284.

When a plan is conceived pursuant to a court order and review, the necessity for the "federal presence" referred to is obviated. There is no need for a second

federal presence. The function contemplated to be served by Section 5 has already been performed. Any new subterfuge will be more "promptly" discovered and enjoined by the court in which the action is already pending.

In a different respect, whether a plan is literally "court-ordered," whether physically prepared by the court or not, has true significance in determining the applicability of Section 5 to a plan such as Kleberg County's. The Act only requires preclearance of those changes in procedure which a political subdivision "enacts or seeks to administer." These terms connote voluntary changes.

The term "enact" means "to make into law." Webster's Third New International Dictionary (1966). The county did not make into law the plan it was ordered to employ by the court. The court did that. The county was required to conduct elections pursuant to the plan ordered into effect by the court, without regard to whether it followed the formalities of enactment. In the sense of Section 5, the court "enacted" the change.

The synonym for the word "seek," when used with an infinitive such as "to administer," is "try." Webster's Third New International Dictionary (1966). The county did not *"try* to administer" the new plan which had been reviewed by the trial court, it was ordered to administer it.

Consistent with this reasoning, a House committee explained that Section 5 "deals with *attempts* by a state or political subdivision . . . to alter by statute or administrative acts voting qualifications and procedures in effect on November 1, 1964." H. Rep. No. 439, U.S. Code Cong. and Admin. News 1965, pp. 2457. A county which is *ordered* to prepare and implement a new plan

is not "attempting" to alter voting procedures as that word is employed in the report.

This Court's analysis of the Voting Rights Act also supports the conclusion that the preclearance provisions of Section 5 were directed to changes instituted by political subdivisions of their own volition:

> The Act suspends new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment * * * Congress knew that some of the States covered by Section 4(b) of the Act *had resorted* to the extraordinary strategem of contriving new rules of various kinds *for the sole purpose* of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States *might try* similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner. * * * The Act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension. A State or political subdivision *wishing* to make use of a recent amendment to its voting laws therefore has a concrete and immediate 'controversy' with the Federal Government. (Citations omitted) An appropriate remedy is a judicial determination that continued suspension of the new rule is unnecessary to vindicate rights guaranteed by the Fifteenth Amendment. (Emphasis supplied)

State of South Carolina v. Katzenbach, supra, 383 U.S., at 334-335; 86 S.Ct., at 822.

The voluntary stratagems, purposes and maneuvers which the Court said preclearance was designed to pre-

vent are not present in a plan prepared under the practised eye of a federal court, especially when that eye already has been sharpened by scrutiny of the facts and circumstances on which the invalidation of the subdivision's existing plan is based and from which the need for a new plan arises. It was not Congress' concern that federal district courts were not qualified to purge new election plans of unconstitutional effects; its concern was the delay which would ensue if litigation were the *only* method available. That this is so is evidenced by an expression in a 1970 House Committee report which dealt with whether the Voting Rights Act should be extended:

> Failure to continue this provision . . . would . . . restore time-consuming litigation as the principle means of assuring the equal right to vote.

House Rep. No. 91-397, U.S. Code and Cong. Admin. News 1970, p. 3284.

Had Congress intended to require Section 5 preclearance of *any* new election procedure regardless of its derivation or the authority pursuant to which it was to be implemented or that it had already received federal scrutiny, it would have been a simple matter for it to have said so in those words. It chose instead to limit the requirement of preclearance to changes which a political subdivision "enacts or seeks to administer." The scope of the Act should not be extended to plans of the type at hand, when to do so would delay rather than expedite the substitution of a constitutional plan for an unconstitutional one, and would impair the equitable jurisdiction of the district court under circumstances which do not call for such a result. *Porter v. Warner Holding Co.*, 328 U.S. 396, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946).

CONCLUSION

For the reasons discussed, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed and the judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November _____, 1980, three copies of the foregoing Brief for Petitioners and of the accompanying Joint Appendix were served upon respondents by depositing the same in the United States Post Office, first-class postage prepaid, addressed to Mr. Bob Parmley, Texas Rural Legal Aid, Inc., 504 Sidney Baker Street, Kerrville, Texas 78028, their attorney.

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NO. 80-180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

W. C. McDANIEL, ET AL.,
Petitioners

v.

JOSE SANCHEZ, ET AL.,
Respondents

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in holding that a proposed reapportionment plan, submitted by a local legislative body in response to an invalidation of a prior plan, does not lose its status as a legislative rather than court-ordered plan for purposes of the preclearance provisions of the Voting Rights Act, 42 U.S.C. 1973(c) merely because it is the product of litigation conducted in a federal forum?

2. Did the Court of Appeals err in holding that a new reapportionment plan enacted by a state, including one purportedly adopted in response to the invalidation of the prior plan by a federal court, will not be considered effective as law until it has been submitted and has received clearance pursuant to the preclearance provisions of the Voting Rights Act, 42 U.S.C. 1973(c)?

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NO. 80-180

IN THE

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OCTOBER TERM, 1980

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Respondents

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Pursuant to Rule 34.2 of the Supreme Court, the plaintiffs,* while not concurring totally with the defendants' characterization of the facts, will not restate the case

* The parties will henceforth be referred to as they were in the trial court: the petitioners-county officials were defendants and respondents were plaintiffs. References to "defendants" in this brief refer to the County Judge and the four County Commissioners rather than the County Clerk and Sheriff.

beyond correcting the following inaccuracies and omissions:

Testimony from the December 10, 1979 hearing on the plan revealed that the defendants, in fulfillment of their legislative duty to reapportion, decided to employ a statistician, Robert Nash, Ph.D., to assist them in the drafting of a new redistricting plan, (J.A. 14, 24, 25). After hiring Dr. Nash, the defendants gave him instructions on how to draft the redistricting plan, which he followed, (J.A. 25, 27, 28). After at least three meetings with the defendants, in foth formal Commissioners Court meetings and informal meetings, Dr. Nash completed the plan, (J.A. 25, 26, 27). He then presented the plan to the Commissioners Court at a formal meeting called in the ordinary course of that legislative body's business. After explaining the plan to the defendants, Dr. Nash was asked by the defendants to make a correction, which he did, (J.A. 28, 35). The defendants then officially adopted the plan at a formal meeting as the plan they would submit to the district court, (J.A. 40), and the plan they would officially adopt if the district court permitted them to do so, (J.A. 40). When asked why the Commissioners Court did not consider either of plaintiffs' plans, the County Judge stated the Commissioners Court would rather "redistrict ourselves" if given the opportunity by the district court, (J.A. 41, 42).

On January 14, 1980, the district court entered an order stating it "approved" the defendants' plan without modification (District Court's order of January 10, 1980; Petition for Certiorari, Appendix, p. A-23). The district court found the plan satisfied the principle of one-person, one-vote but made no finding in relation to the dilution

of minority voting rights and at the same time found Section 5 preclearance was unnecessary. (District Court's Order of January 10, 1980; Petition for Certiorari, Appendix, p. A-22, 23).

SUMMARY OF THE ARGUMENT

Under the federal common law of remedies applicable to reapportionment cases, the defendants' redistricting plan should be considered a "legislative plan" rather than a "court-ordered plan." *Burns v. Richardson,* 384 U.S. 73 (1966); *Wise v. Lipscomb,* 437 U.S. 535 (1978); *Connor v. Waller,* 421 U.S 656 (1975); *U.S. v. Board of Supervisors, Warren County, Miss.,* 429 U.S. 642 (1977); and *Morris v. Gressette,* 432 U.S. 49 (1977). Under Article 5, Section 18 of the Texas Constitution, the defendants had authority to redistrict the county commissioners precincts when they submitted their plan to the district court and received the court's approval. *East Carroll* should be read as turning on its own peculiar facts. This Court should adhere to its ruling in *Board of Supervisors, Warren Co., Miss.*

Federal common law precedent aside, a political subdivision's legislative authority should not become a factor in deciding whether or not a plan is "legislative" or "court-ordered" for the purpose of Section 5 preclearance; when a political subdivision proposes a reapportionment plan to the court, that act alone should trigger Section 5 coverage because the political subdivision is seeking to administer a voting change by having the court incorporate the subdivision's plan in its order. To rule otherwise would be contrary to the legislative history of the Voting Rights Act and would permit a judicially created

exception to become a vehicle for the circumvention of the Act. Other undesirable results that would be caused by the adoption of such an exception to the Section 5 preclearance requirement would include: increased litigation and exhaustion of judicial resources, the compromise of state legislative policy choices when state plans fail to meet the higher standards of review for judicial plans, and the entanglement of the federal judiciary in the process of state reapportionment.

ARGUMENT

1. THE FEDERAL COMMON LAW OF REMEDIES APPLICABLE TO REAPPORTIONMENT PLANS DICTATES THAT THE COUNTY'S PLAN BE CATEGORIZED AS "LEGISLATIVE" RATHER THAN "COURT-ORDERED" AND SUBJECT TO THE SECTION 5 PRECLEARANCE REQUIREMENT

The Kleberg County defendants argue that the apportionment plan adopted by the county and "approved"[1] by the district court is "court-ordered" rather than "legislative", and therefore not subject to Section 5 review. They cite *East Carroll Parish School Board v. Marshall,* 424 U.S. 636 (1976) as controlling and argue that other authorities support their contention, e.g. *Connor v. Johnson,* 402 U.S. 690 (1971); *Morris v. Gressette,* 432 U.S. 491 (1977); *Connor v. Waller,* 421 U.S. 656 (1975); and *Wise v. Lipscomb,* 437 U.S. 535 (1978). In the arguments to follow, plaintiffs will show why the defend-

1. District Court's Order of October 2, 1979; Petition for Certiorari, Appendix, p. A-23.

ants' reliance on these cases is misplaced, and in fact, why these decisions in reality support the plaintiffs' contention that the subject plan is a creature of legislative fiat which must first be reviewed by the District Court for the District of Columbia or the Attorney General prior to its implementation.

The Court first addressed the issue raised by this appeal in *Connor v. Johnson*, 402 U.S. 690 (1971), on application for an emergency stay of a multi-member legislative apportionment plan formulated by a three-judge district court. The applicants for the stay, plaintiffs in the litigation below, asked that the filing deadline be extended, and that the lower court be required to fashion a single-member district plan, or, in the alternative, submit the court's own plan to the Attorney General or the District Court for the District of Columbia for Section 5 review. The *per curiam* opinion dismissed the latter request with the observation that, "[A] decree of the United States District Court is not within the reach of Section 5 of the Voting Rights Act of 1965." 402 U.S. at 691. That brief reference in *Connor* has been greatly qualified in subsequent decisions of this Court, particularly in cases such as this litigation where (1) the district court played no active role in formulating the apportionment scheme, and (2) exigent circumstances caused by the time pressures of an imminent election are absent. Indeed, the district court in the present litigation did not even enter its order declaring the existing plan unconstitutional until one year after the case was submitted for decision.

Defendants next argue that the instant case is controlled by dicta in a footnote in this Court's *per curiam* opinion in *East Carroll Parish School Board v. Marshall*, 424

U.S. 636 (1976).[2] The county argues, that like the Board and Jury in *East Carroll,* the defendants did not have legal authority to enact the plan presented to the district court. In support of their disavowal of authority, defendants cite Article 2.04(1) of the Texas Election Code and *Wilson v. Weller,* 214 S.W.2d 473 (Tex. Civ. App. 1948, no writ). Plaintiffs disagree with defendants' reading of *East Carroll,* as well as their interpretation of state law.

In *East Carroll* the district court, *sua sponte* and as part of its continuing jurisdiction over a previous malapportionment action involving the Jury and the Board, requested that the Jury and Board submit a new apportionment plan, as the 1970 census had just been published. The Jury and the Board resubmitted their existing at-large plan which was originally implemented through a consent decree in previous litigation, *Marshall v. Edwards,* 582 F.2d 927, 929 (5th Cir. 1978), *cert. den.* 442 U.S. 909 (1979). Stewart Marshall was permitted to intervene as a party plaintiff. Marshall challenged the validity of the at-large plan on the grounds that it violated 1) the Fourteenth and Fifteenth Amendments and 2) the Voting Rights Act of 1965 since the Attorney General had interposed an objection to the Louisiana law enabling the creation of at-large juries and parishes. The district

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2. Defendants rely on *East Carroll* as controlling the outcome of the instant case. (Pet. Br. 11, 15, 16) If, as plaintiffs suggest in their discussion of *U.S. v. Board of Supervisors, Warren Co., Miss.,* 429 U.S. 642 (1977), *post East Carroll* has been restricted to its own peculiar facts by *Board of Supervisors, Warren Co., Miss.,* then defendants' arguments would fail if they are unable to demonstrate that the facts of the instant case are substantially identical to *East Carroll.* See also, *Wise v. Lipscomb,* 437 U.S. at 549, Justice Powell, concurring in part and concurring in the judgment, reading *East Carroll* as turning on its own peculiar facts because the brief *per curiam* opinion failed to mention *Burns v. Richardson,* 384 U.S. 73 (1966).

court approved the Jury's plan after finding it to be constitutional. Marshall appealed it. A panel of the court of appeals affirmed the district court's decision and held that the Voting Rights Act did not apply. *Zimmer v. McKeithen,* 467 F.2d 1381 (5th Cir. 1973).

On rehearing en banc the full court of appeals disagreed with the panel and reversed the district court. *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973) (en banc). Judge Gewin wrote the opinion for the closely divided court, which held that the at-large system unconstitutionally diluted the votes of Blacks. Because the court of appeals resolved Marshall's challenges on constitutional grounds, the opinion did not directly address the issue of Section 5 of the Voting Rights Act.

The Supreme Court affirmed, *sub nom., East Carroll Parish School Board v. Marshall,* 424 U.S. 636 (1976). In a unanimous *per curiam* opinion, it was held that the district court had abused its discretion in not ordering a single-member reapportionment plan since no special circumstances dictated the use of multi-member districts. The Court observed, in a footnote response to a suggestion in the Government's amicus brief, that the preclearance procedures of Section 5 of the Voting Rights Act were not applicable to the Jury's plan:[3]

> In any event, we agree with the Court of Appeals, *Zimmer v. McKeithen,* 467 F.2d, at 1302 n.9, that court-ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by § 5. Had the East Carroll police jury reappor-

3. Concerning this footnote Mr. Chief Justice Burger said, "[T]he scope of § 5 of the Voting Rights Act is an important matter and I would not undertake to express any view on what the Court discusses by way of dicta in n. 6." 424 U.S. at 640.

> tioned itself on its own authority, clearance under § 5 of the Voting Rights Act would clearly have been required. *Connor v. Waller,* 421 U.S. 656 (1975). However, in submitting the plan to the District Court, the jury did not purport to reapportion itself in accordance with the 1968 enabling legislation, see n.2, supra and statutes cited therein, which permitted police juries and school boards to adopt at-large elections . . . App. 56. Moreover, since the Louisiana enabling legislation was opposed by the Attorney General of the United States under § 5 of the Voting Rights Act, the jury did not have the authority to reapportion itself. See n.2, supra; . . . . Since the reapportionment scheme was submitted and adopted pursuant to court order, the preclearance procedures of § 5 do not apply. *Connor v. Johnson,* 402 U.S. 690, 691, (1971).

424 U.S. at 638-639, n.6.

Again, the Court addressed the preclearance issue without the benefit of full briefing and argument by the parties, and in a context decidedly different from the case at bar. First, the plan in *East Carroll* that was submitted to the Court was not one devised by the legislative body, but rather the resubmission of a plan contained in a judicially approved consent decree from 1968. In contrast, the Kleberg County plan was formulated by the defendants without any input from the plaintiffs, or, for that matter, the district court. Another factor that distinguishes the instant case from *East Carroll* is that the Jury lacked the authority to reapportion itself, because the Louisiana at-large enabling legislation had been opposed by the Attorney General under Section 5, and was therefore void. Kleberg County, on the other hand, was not precluded by either state or federal law from enacting an apportionment plan.

Defendants argue that Article 2.04(1) of the Texas Election Code, as construed in *Wilson v. Weller,* 214 S.W.2d 473 (Tex. Civ. App. 1948, no writ hist.), prevents the defendants from redistricting in any month other than July or August, and that the defendants were without state authority to adopt a plan in December. (Pet. Br. 16) First, it should be observed that the defendants never raised this "lack of authority" argument until their petition for rehearing with the Fifth Circuit. Since neither the district court not the court of appeals addressed this issue, there will be no findings below to guide this Court.[4] The sole issue addressed by both lower courts was whether or not the instant plan lost its legislative status merely because it was submitted in response to a court order invalidating the existing plan. Since the defendants have, at the eleventh hour, raised this as a significant issue, plaintiffs will address it without waiving their objection to its untimely creation.

To understand the defendants' authority to redistrict it is necessary to distinguish "commissioners court precincts"

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4. Although the district court did not address the issue of the authority of the defendants to act under state law, a comparison of the instant case to another case decided by the same district court indicates the court would have found that the defendants had legislative authority. In *Jim Wells Co. Women's Political Caucus v. Jim Wells County, Texas,* (Civil No. 73-C-125, S. D. Tex., 1973), the court found the county malapportioned, accepted the county redistricting plan, and ordered it into effect. The redistricting plan included a redistricting of the commissioners court precincts as well as election precincts, unlike the instant case where there is only a redistricting of the commissioners court precincts. The Jim Wells plan was presented on January 18, 1974. At a later Section 5 coverage hearing, the same district judge, sitting in a three-judge district court, ruled that the 1974 Jim Wells County reapportionment plan was a "court-approved plan . . . and must be submitted to the Department of Justice for preclearance pursuant to Section 5 of the Voting Rights Act." *Arriola v. Harville* (Civil No. C-78-87, S.D. Tex. October 9, 1979, p. 5).

or "county precincts" from "election precincts" or "voting precincts". "Commissioners court precincts" are created by the Texas Constitution, Article 5, Section 18. "Election precincts" or "voting precincts" are created by an act of the Legislature, Texas Election Code, Article 2.04(1). "Commissioners court precincts" are political subdivisions defining the jurisdiction of county commissioners, justices of the peace, and constables. *Tex. Const.*, Art. 5, § 18. On the other hand, "election precincts" are merely geographical areas defining the polling places for the registered voters who are residents of the precincts. *Tex. Elect. Code,* Art. 2.04(1).[5] Election precincts are not representative districts, *Anderson v. Crow,* 260 S.W.2d 227, 233 (Tex. Civ. App. 1953, writ ref'd.), and are not required by law to be redistricted when commissioners court precincts are redistricted. *Tex. Const.*, Art. 5 § 18.

The authority of the defendants to redistrict the county in December or at any other time of year is found in the Texas Constitution, which states, "Each organized county in the State . . . shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight." *Tex. Const.* Art. 5, § 18. The Texas Supreme Court has interpreted the state constitution quite broadly, saying: "When the commissioners' court was organized, in pursuance of the Constitution and the laws passed thereunder, it possessed all powers conferred by both. When the court was once established, no legislation was needed to enable it to exercise the

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5. The purpose served by the time restrictions of Art. 2.04(1), *Tex. Elect. Code,* is to prevent confusion among voters as to where they should go to vote and to insure that voter registration lists and cards will be ready prior to the eve of the election, *Wilson, supra,* 214 S.W.2d at 474 (1948) (referring to the "payment of poll taxes and the certifying of poll lists").

powers given by the above provision, to divide the county into precincts. The direction is plain and simple, and without condition or restriction, except that as to the number of precincts." *Williams v. Castleman,* 247 S.W. 263, 266 (Tex. 1922). The highest Texas court further said, "As to the time of making the division it is equally plain. The language 'from time to time, for the convenience of the people', clearly means that the convenience of the people, as judged by the Court, shall control in determining the time when division is proper. The phrase, 'from time to time' repels the idea that it was the purpose to fix any particular time." *Ibid.* 247 S.W. at 267.

Defendants suggest that Art. 2.04(1), *Tex. Elect. Code,* which prohibits the redivision of election precincts at any term of the commissioners court other than a July or August term, is a bar to their authority to redistrict commissioners precincts in December. But defendants are confusing election precincts with commissioners precincts, and ignoring the plain words of *Castleman, supra.* The statutory time restrictions on the division of election precincts could not, and does not, restrict the redistricting of commissioners precincts under the authority of Art. 5, § 18, *Tex. Const.*[6] Indeed, Art. 2.04(2), *Tex. Elect.*

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6. In *Mauzy v. Legislative Redistricting Board,* 471 S.W.2d 570, 574, 575 (Tex. 1971), the Texas Supreme Court found that a state statute, which placed time limitations on every Texas political subdivision or agency (except the Legislature) so that they could not ". . . ever officially recognize or act upon any report or publication, in whatever form, of any Federal Decennial Census . . . before the first day of September of the year immediately following the calendar year during which such census was taken", *Vern. Ann. Civ. Stats.,* Art. 29d, is ineffective insofar as it conflicts with Sec. 28, Art. III of the Constitution. Art. III, § 28 vests the Legislative Redistricting Board with authority to redistrict the State if the Legislature fails to do so in the first regular session following the publication of the census. See also, *Smith v. Craddick,* 471 S.W.2d 375 (Tex. 1971),

Code, states that if there exists any election precinct that has been "split" between parts of "two or more . . . commissioners precincts" then the commissioners court should correct that division in the September term. Such a provision implies that election precincts may be "split" between two or more commissioners precincts incidental to the process of redistricting the commissioners precincts. However, should the commissioners court decide to redistrict election precincts, then Art. 2.04(1) requires that the commissioners do so in a July or August term.

Defendants look to *Wilson v. Weller*, 214 S.W.2d 473 (Tex. Civ. App. 1948, no writ hist.), to shun their obvious authority to redistrict their own commissioners precincts "from time to time, for the convenience of the people."[7] Ironically, *Wilson* involved another effort to redistrict Kleberg County—one sought by the commissioners themselves. By a single, unitary order entered on June 7, 1948, the court sought to change the boundaries of commissioners, justices of the peace, and voting precincts. A state district court injunction against the plan's implementation was affirmed by the intermediate appellate court on the ground that the effect to redistrict the voting precincts was void, since it was not accomplished in the July or August term of court. Therefore, since part of the comprehensive plan was invalid, the entire redistricting order was void, including the redistricting of commissioners precincts.

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where the Texas Supreme Court struck down a state reapportionment statute (No. 783, 62nd Leg. Reg. Sess. 1971) because it conflicted with Art. III, Sec. 26 of the Texas Constitution.

7. Defendants do not argue that they had no authority to redistrict, they simply argue their proposed plan was presented to the district court at an improper time of year under their reading of Art. 2.04(1), *Tex. Elect. Code* (Pet. Br. 16).

Although there are serious questions with regard to the validity of the *Wilson* decision as a matter of Texas law, e.g. conflict with *Williams v. Castleman, supra,* the case is simply inapplicable here. Unlike in 1948, the Kleberg County Commissioners Court this time has not purported to alter or change the boundaries of any election or voting precincts. The district court ordered the defendants to present a constitutionally-acceptable plan for reapportionment of the *commissioners* precincts, not the *election* precincts. The defendants responded by submitting a plan for redistricting *commissioners* precincts, not *election* precincts. The defendant County Judge testified, in fact, that the changes in commissioner precincts would not affect the voting precincts "insofar as an election is concerned" (J.A. 36), and that the election precincts were not reenumerated, but simply "split". (J.A. 48). There being no change in voting precinct boundaries, *Tex. Elect. Code,* Art. 2.04, and *Wilson v. Weller* are inapposite.

Furthermore, the election precincts that were split by commissioner precinct lines were split on the defendants' own volition. They were under no coercive order from the district court to do so, and instructions to their statistician to avoid electoral precinct splits would probably have been effective. Indeed, plaintiffs submitted a plan at the first trial on October 30, 1978, that did not require any splits or voting precinct changes. See plaintiffs' exhibits nos. 5 and 6. Defendants did not offer their expert that plan out of fear that he might be "polluted" by other plans. (J.A. 42).

Defendants next cite as instructive a footnote in *Morris v. Gressette, supra,* where this Court compared the legis-

lative plan in *Connor v. Waller,* 421 U.S. 656 (1975), with the court-ordered plan in *East Carroll.* (Pet. Br. 16, 17). The defendants fail to mention that *Morris* itself stands for the proposition that a plan submitted by the political subdivision pursuant to litigation does not lose its legislative status merely because it is submitted pursuant to court order and that it will not be effective as law until it has been precleared pursuant to Section 5.

In *Morris, supra,* South Carolina enacted a reapportionment statute for the State Senate. The State sent a notice to this effect to the Attorney General. Before the Attorney General could rule on the submission, plaintiffs filed a lawsuit based on the Fourteenth and Fifteenth Amendments, as well as Section 5. Shortly thereafter the Attorney General objected to the apportionment statute. The district court, aware of this Section 5 objection, refused to hear the plaintiffs' Section 5 complaint and chose instead to rule on the plaintiffs' Fourteenth and Fifteenth Amendment claims. The Court found that the South Carolina Senate reapportionment violated the one person, one vote principle but did not dilute minority voting rights and gave the state thirty days to submit a new apportionment plan. A new plan was submitted to the district court, as well as to the Attorney General for Section 5 preclearance. Before the Attorney General could rule on the plan, the district court found it to be constitutional. The Attorney General, relying on *Johnson,* decided not to pass judgment on the plan since that decision had already been made by the district court.

Plaintiffs filed an action in the District Court for the District of Columbia and secured an order requiring the Attorney General to rule on the plan. Pursuant to this interlocutory order the Attorney General interposed an

objection to the plan. The plaintiffs then filed a Section 5 enforcement action in the district court in South Carolina. That complaint was dismissed because of the failure of the Attorney General to rule within sixty days of the completion of the submission. Plaintiffs appealed, arguing that the interlocutory order of the District Court for the District of Columbia gave the Attorney General authority for his otherwise untimely objection.

The Supreme Court found that the order of the District Court for the District of Columbia was invalid because no judicial review was permitted of the Attorney General's Section 5 decision; consequently, the Attorney General's objection was more than sixty days late and, hence, had no force or effect under Section 5.

The instructive feature of *Morris* for purposes of the present litigation is the fact that the South Carolina plan had to be submitted to the Attorney General, even though it was prepared pursuant to a court order, and even though the district court in that case had found the plan to be constitutionally valid. As this Court said, "[S]ince that plan has not been declared by the District Court for the District of Columbia to be without racially discriminatory purpose or effect, it can be implemented only if the Attorney General 'has not interposed an objection' to the plan within the meaning of § 5 of the Voting Rights Act." *Ibid.* 482 U.S. at 499, 500; see also, *Ibid.* 432 U.S. at 499, note 12 (agreement of both parties that Section 5 is applicable).

Plaintiffs contend that *Morris* and *Board of Supervisors, Warren Co., Miss., post,* are controlling authority for the disposition in this case as well as this Court's holding in *Wise v. Lipscomb,* 437 U.S. 535 (1978).

In *Wise,* an action was brought by Black residents of Dallas, Texas, against the mayor of Dallas and members of the Dallas city council. The district court held that the at-large system of electing city council members, as mandated in the city charter, unconstitutionally diluted the voting strength of Black citizens. The court then afforded the city council an opportunity to prepare a constitutional reapportionment plan. Thereafter, the city council proposed to pass an ordinance that would provide for eight council members to be elected from single-member districts and for the remaining three members, including the mayor, to be elected at-large. The district court then approved the plan and the city council formally enacted the ordinance. Later the district court issued an opinion sustaining the council's plan as a valid legislative act. This was done despite the fact that state constitutional and statutory provisions required a referendum vote to amend the city charter. *Lipscomb v. Wise,* 399 F. Supp. 782, 789 (N.D. Tex. 1975).

The court of appeals reversed, holding that the district court had erred by evaluating the council's actions only under constitutional standards rather than also applying the principle that absent exceptional circumstances, "judicially-imposed" reapportionment plans should employ single-member districts. *Lipscomb v. Wise,* 551 F.2d 1043 (5th Cir. 1977).

The Supreme Court reversed and remanded. Although unable to agree on an opinion, six members of the Court agreed that the "eight/three" ordinance was a "legislative plan" to be judged under the relatively more lenient constitutional standards, which would permit the three multi-member districts adopted by the Dallas council.

Justice White announced the judgment of the Court, and in an opinion joined by Justice Stewart, expressed the view that when the district court invalidated the provisions of the Dallas city charter mandating at-large council elections, the City had the duty to devise a substitute plan rather than to leave the matter to the district court. The Court then observed that even though the council itself had no power to change the at-large system, as long as the city charter was declared unconstitutional, the council was free to exercise its inherent legislative powers by enacting an ordinance concerning the eight/three plan. Consequently, the Court found that the district court should consider the city council's substitute plan under the principles applicable to legislatively-adopted reapportionment plans rather than judicially-imposed plans and that the council's ordinance should not be subject to a level of scrutiny more stringent than that required by the Constitution.

Justice Powell, joined by the Chief Justice, and Justices Blackmun and Rehnquist, concurring in part and concurring in the judgment, agreed that the reapportionment plan adopted by the Dallas city council was a "legislative" plan for purposes of review by a federal court. They further expressed the view that the plan was "legislative" regardless of whether the council had the power under state law to reapportion itself, the essential point being that the city council had exercised a legislative judgment which reflected the policy choices of the elected representatives of the people rather than the directive of a federal court.

Justice Marshall, joined by Justices Brennan and Stevens, dissenting, expressed the view that since the

Dallas city council had no authority under state law to reapportion itself, the plan ordered by the district court should have been evaluated in accordance with the federal common law of remedies applicable to judicially devised reapportionment plans. Even if the plan were properly to be viewed as a "legislatively enacted" plan, it should not be approved, since the vice in the original apportionment system was the dilution of the voting power of a racial minority resulting from at-large voting, and thus it was inappropriate either for the local legislative body or a court to maintain the same system.

The facts described in the majority opinion in *Wise* parallel the facts in the instant case. First, when the district court found the 1968 Kleberg County apportionment plan unconstitutional, that court, citing *Wise,* deferred judicial imposition of a plan pending action by the legislative body to reapportion itself. (District Court's Memorandum and Order of October 2, 1979; Petition For Certiorari, Appendix p. A-19). The legislative body then responded to its duty and decided, when given the opportunity, to "redistrict ourselves". (J.A. 42). The commissioners court adopted a plan for presentation to the district court as the plan they officially wanted and would adopt, if permitted by the district court. (J.A. 40). The district court then "approved" the plan for the 1980 election. (District Court's Order of October 2, 1979; Petition for Certiorari, Appendix, p. A-19). Second, the defendants had the appropriate authority to redistrict the commissioners precincts at the time they submitted the plan to the court as previously discussed.

Since the dissenting members of the Court in *Wise* would not have dissented on the issue of "legislative" versus "court-ordered" plans had they believed that the

Dallas city council had valid legislative authority, it follows that the existence of such authority here unites the Court in support of the plaintiffs' contention that the plan of the Kleberg County Commissioners is a legislative plan,[8] that it did not lose its "legislative"

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8. Defendants argue that the Justices supporting this "legislative judgment" concept would find that defendants did not exercise the policy choices of elected representatives by having a college professor prepare a mathematical redistribution of Kleberg County according to the 1970 census. (Pet. Br. 18) This argument overlooks the fact that it was the defendants who decided to hire an expert (J.A. 24); it was the defendants who decided who that expert would be (J.A. 14, 24, 25); it was the defendants who instructed the expert in his drawing of the plan (J.A. 25, 28), indeed, the expert had no interest in the plan other than as instructed by the defendants; it was the defendants who modified Dr. Nash's plan (J.A. 28, 35); and, most important of all, it was the defendants who adopted the plan as the plan they would submit to the district court and enact if the court permitted them to do so (J.A. 40). Additionally, the apparent benign modification made by the defendants had the effect of taking a Justice of the Peace for county precinct four out of the courthouse and replacing him with a Justice of the Peace from precinct one. County precinct four has a 97.5% Mexican-American majority while county precinct one has a 59.7% Anglo majority according to the 1970 census (J.A. 77). The Justice of the Peace in the courthouse is, by practice, the magistrate who sets criminal bonds and handles other criminal matters, because the sheriff's office and jail is located in the courthouse. See *Tex. Code Crim. Pro.*, Art. 1703 (personal bonds), Art. 1705 (bail bonds), Art. 1517 and 1406 (informs accused of his rights), and Art. 1503 (issue warrants), see Art. 2.09 for definition of magistrate. Also, the Justice of the Peace in the courthouse has broader jurisdiction to hear civil cases than other Justices of the Peace, *Vern. Ann. Civ. Stats.*, Art. 2390. Clearly this modification was a policy decision affecting the community. This is not the first time citizens residing in precinct four have been adversely affected by the decisions of the Anglo dominated commissioners court. At the trial of this case on October 30, 31, 1978, the Plaintiffs introduced into evidence the Kleberg County audit reports from 1968-1977 (plaintiffs' exhibits 36-50). The major expenditures by the County over this ten year period revealed that the County only spent $1,670.84 in precinct four out of a $2,779,536.54 ten year budget for major expenditures. (See, cumulative chart of major expenditures of Kleberg County, 1968-1977, plaintiffs' exhibit 73).

status merely because it was submitted in response to a court order, and that it should not be considered effective as law "until it has been submitted and has received clearance under Section 5."

Other recent decisions of this Court compel the conclusion that the Kleberg County plan is a creature of the exercise of the legislative will of the defendants, and therefore subject to Section 5 review. *Burns v. Richardson,* 384 U.S. 73 (1966); *U.S. v. Board of Supervisors, Warren County, Miss.,* 429 U.S. 642 (1977); and *Connor v. Waller,* 421 U.S. 656 (1975).

In *Burns, supra,* a three-judge district court declared Hawaii's senate apportionment scheme unconstittuional under the principles announced in *Reynolds v. Sims,* 377 U.S. 533 (1964). The district court later directed the Hawaii Legislature to present it with an interim plan pending future action by the Legislature to amend its constitution to provide for the reapportionment of senate seats. The Legislature enacted such an interim plan, even though the Legislature did not have the power under the state constitution to reapportion the senate seats without a constitutional amendment. *Ibid.* 377 U.S. at 78, n. 5. The district court disapproved of the interim plan, finding it objectionable, in part, because it used multi-member districts. The Supreme Court reversed, in part on the ground that the interim proposal was a "legislative" plan that would be set aside only on a showing of purposeful discrimination against an identifiable element of the population. 384 U.S. at 89. Hence, this Court acknowledged that the absence of authority to redistrict under state law does not automatically convert the otherwise "legislative" action into a judicially-imposed apportionment plan.

In *U.S. v. Board of Supervisors, Warren Co., Miss.*, 429 U.S. 642 (1977), the Board redistricted in 1970 pursuant to a plan to which the Attorney General had interposed a Section 5 objection. The County Board held elections pursuant to the 1970 plan. Thereafter, the Attorney General filed a Section 5 complaint in the District Court for the Southern District of Mississippi alleging that his objection to the 1970 redistricting plan rendered it unenforceable under Section 5, and that the pre-1970 election districts were malapportioned under the Fourteenth Amendment. The Attorney General sought (1) a declaration that implementing the 1970 plan violated Section 5, (2) an injunction against implementing the 1970 plan or any other new plan until there was compliance with Section 5, and (3) an order that a new plan be developed and implemented after being found acceptable under the Act. The three-judge district court entered summary judgment for the Attorney General and decided that the 1970 plan was unconstitutional on Fourteenth and Fifteenth Amendment grounds. The court then directed that the parties attempt to agree on a new plan. When the parties could not agree on a new plan the court adopted a plan prepared by the county, even though the plan had not been approved under Section 5.

On direct appeal, the Supreme Court reversed and remanded. In a *per curiam* opinion, expressing the unanimous view of the Court, it was held that in a "coverage" action brought in a local three-judge district court the inquiry is limited to whether the change was subject to federal approval under Section 5, and the district court should not consider whether the change discriminated on account of race, since substantive discrimination issues are reserved by the Act for consideration by

the District Court for the District of Columbia or the Attorney General. Of particular significance in *Board of Supervisors, Warren Co., Miss.* is this Court's statement that "[I]n both instances the court below erred in deciding the questions of constitutional law; it should have determined only whether Warren County could be enjoined from holding elections under a new redistricting plan because such plan had not been precleared under § 5." *Ibid.* 429 U.S. at 647.

As in *Board of Supervisors, Warren Co., Miss.*, the court below, after finding a Fourteenth Amendment violation, ordered the legislative body to produce a constitutionally acceptable plan, and in both cases the political subdivision's plan was considered legislative in character even if it had been submitted in response to a court order. Section 5 preclearance was required by the Fifth Circuit regardless of a finding of constitutionality by the district court, consistent with this Court's decision in *Board of Supervisors, Warren Co., Miss.* The instant case differs from *Board of Supervisors, Warren Co., Miss.* only by the fact that the Board's second plan was opposed by the Attorney General under Section 5.

One final case that supports the defendants' position is *Connor v. Waller, supra.*[9] In *Waller*, the court-formulated,

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9. Defendants in their brief concede that the apportionment plan in *Waller* required Section 5 preclearance. They argue that the Legislature acted independently of the court proceeding and the plan was adopted "in the course of litigation" only in the sense of contemporaneousness. (Pet. Br. 17). This alleged independence of the Legislature from the concerns of the litigation is not supported by the district court record which describes the hearing below on the constitutionality of the 1973 plan saying that several of the legislators attended and "[I]mmediately after the hearing . . . it became public knowledge that the Legislature had initiated another effort to re-

multi-member plan originally adopted in *Johnson, supra,* was still in effect, despite the Supreme Court's instruction in *Johnson* that, on remand, single-member districts for Hinds County should be used if at all possible; and despite instruction from the Supreme Court in *Connor v. Williams,* 404 U.S. 549 (1972), that a special master be appointed to draw single-member districts for Hinds County to replace the *Johnson* court-formulated plan. Under this pressure and in response to this Court's policy of legislative deferment announced in *Chapman v. Meier,* 420 U.S. 1 (1975), the Mississippi Legislature enacted a state reapportionment statute. *Connor v. Waller,* 396 F. Supp. 1308, 1310, 1311 (S.D. Miss. 1975). The three-judge district court in *Waller* found that apportionment statute to be constitutional and not subject to Section 5 preclearance requirements under *Johnson.*

On appeal to the Supreme Court, the three-judge district court was reversed in a *per curiam* order expressing the unanimous view of the eight participating members of the Court. This Court stated that the Mississippi apportionment statutes ". . . are not now and will not be effective as law until and unless cleared pursuant to Section 5. The district court accordingly erred in deciding the constitutional challenges to the Acts based upon claims of racial discrimination." *Waller,* 421 U.S. at 656. Similarly, the Court in the instant case should find that the plan is a legislative plan whose constitutionality should not have been judged by the district court until the defendants had complied with the Section 5 preclearance procedure, *Waller, supra; Board of Supervisors, Warren Co., Miss., supra; Morris, supra.*

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apportion its membership." *Waller,* 393 F. Supp. 1308, 1310, 1311 (S.D. Miss. 1975).

2. PRECEDENT ASIDE, THE LEGISLATIVE HISTORY AND PURPOSE OF THE VOTING RIGHTS ACT REQUIRE SECTION 5 PRECLEARANCE IN THE INSTANT CASE

A. History And Purpose Of The Voting Rights Act

The Voting Rights Act of 1965 grew out of a long history of resistance to the Fifteenth Amendment's proscription of racial discrimination in voting. That history, which was reviewed by the Supreme Court in the course of upholding the Act's constitutionality in *South Carolina v. Katzenbach,* 383 U.S. 301, 308-315 (1966), showed a persistent and often ingenious use of tests and devices to disenfranchise Black citizens.[10] Congress, in response, banned or restricted the use of many of these discriminatory devices.[11] Additionally, Congress recognized ". . . that some of the States covered by Section 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination . . . (and) that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." *Ibid.* 383 U.S. at 335. To foreclose these anticipated evasive maneuvers, Congress enacted the broad prophylactic rule of Section 5 of the Act, which prohibits covered states which "enact or seek to administer" any new "voting qualification or prerequisite to voting, or standard, practice or procedure with

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10. H. R. Rep. No. 437, 89th Cong. 1st Sess. 8-13 (1965); S. Rep. No. 162, Pt. 3, 89th Cong. 1st Sess., 3-12 (1965).

11. These devices include literacy tests, requirements of "good moral character", and voucher requirements, §§ 4(a)-(b), 42 U.S.C. §§ 1973b(a)-(d), as well as poll taxes, § 10, 42 U.S.C. § 1973h.

respect to voting" from doing so without first securing the approval of either the Attorney General or the United States District Court for the District of Columbia. 42 U.S.C. § 1973c. In an effort to avoid the delays and uncertainties fostered by prior statutes, under which affected parties or the Attorney General had been forced to assume the initiative in challenging discriminatory voting practices, Congress placed the burden of proof in Section 5 proceedings squarely upon the acting state or municipality to show that its proposed change is free of a racially discriminatory purpose or effect. In short, Congress, through the Voting Rights Act of 1965, imposed a stringent and comprehensive set of controls upon states falling within the Act's coverage.

In considering the 1975 extension of the Act, Congress gave careful consideration to the propriety of readopting Section 5's preclearance requirement. After determining that Section 5 should be extended for another ten years, Congress gave that provision this strong endorsement:

> . . . The Committee is convinced that it is largely Section 5 which has contributed to the gains thus far achieved in minority political participation. Moreover, it is Section 5 which serves to insure that this progress shall not be destroyed through new procedures and techniques. Now is not the time to jeopardize this progress through the removal of these crucial preclearance protections.

S. Rep. No. 94-295, 94th Cong., 1st Sess., 19 (1975).

In making its decision to extend for another ten years the Voting Rights Act, the Committee was aware of the significant role Section 5 would play after the publication

of the 1980 census.[12] The legislative history of the 1975 extension specifically expresses the intent of Congress that Section 5 apply to all voting changes[13] including reapportionment plans adopted in the course of litigation.[14] The report of the Senate Committee which considered the extension stated that Section 5 is intended to establish, ". . . a form of primary jurisdiction for Section 5 review under which courts dealing with voting discrimination issues should defer in the first instance to the Attorney General or to the District of Columbia

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12. Commenting on the role of Section 5 in the upcoming 1980 reapportionment cases, the Senate Committee said: "[I]t is ironic that the Supreme Court's one-man, one-vote ruling [*Reynolds v. Sims*, 377 U.S. 533 (1964)] has created opportunities to disenfranchise minority voters. Having to redraft district lines in compliance with that ruling, jurisdictions may not always take care to avoid discrimination against minority voters in that process. By providing that Section 5 protections not be removed before 1985, S. 1279 would guarantee Federal protection of minority voting rights during the years that the post-census redistricting will take place." S. Rep. 94-295, 94th Cong., 1st Sess., 18 (1975).

13. See, *Dougherty County, Ga., Board of Education v. White*, 439 U.S. 32 (1978), where this Court found that ". . . both the House and Senate Judiciary Committees, in recommending extension of the Act, noted with approval the 'broad interpretations of the scope of Section 5' in *Allen* and *Perkins v. Matthews*. S. Rep. No. 94-295, p. 16 (1975); H.R. Rep. No. 94-196, p. 9 (1975). Confirming the view of this Court, the Committee Reports stated, without qualification, that '[S]ection 5 of the Act requires review of *all* voting changes prior to implementation by the covered jurisdictions.' S. Rep. 15; H.R. Rep. 8 (emphasis added)." 439 U.S. at 39.

14. Congress has endorsed only one exemption to Section 5 coverage in the field of reapportionment resulting from litigation and that was this Court's holding in *Johnson, supra*. "The one exception where Section 5 review would not ordinarily be available is where the Court, because of exigent circumstances, actually fashions the plan itself instead of relying on a plan presented by a litigant. This is the limited meaning of the "court decree" exception recognized in *Connor v. Johnson*, 402 U.S. 590 (1971)." S. Rep. No. 94-295, 94th Cong., 1st Sess., 19 (1975).

District Court." S. Rep. No. 94-295, 94th Congress, 1st Sess., 18 (1975). The Senate Committee further spoke directly to the issue of the application of the Voting Rights Act to the instant case saying:

> Thus, for example, where a federal district court holds unconstitutional an apportionment plan which predates the effective date of a coverage under the Voting Rights Act, any subsequent plan ordinarily would be subject to Section 5 review. In the typical case, the court either will direct the governmental body to adopt a new plan and present it to the court for consideration or else itself choose a plan from among those presented by various parties to the litigation. In either situation, the court should defer its consideration of—or selection among—any plans presented to it until such time as these plans have been submitted for Section 5 review. Only after such review should the district court proceed to any remaining Fourteenth or Fifteenth Amendment questions that may be raised.

S. Rep. No. 94-295, 94th Cong., 1st Sess., 18, 19 (1975).

While the Senate expressed its will that Section 5 apply to a reapportionment plan such as presented in these circumstances,[15] no changes in the language of Section 5 were considered necessary to accomplish that

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15. The Senate Committee cited *Gaillard v. Young*, (Civil No. 74-1265 D. S. Car. 1975), as a correct example of the application of Section 5. In *Gaillard*, the district court waited until the Attorney General had approved the submitted plan, before the court ordered it implemented. S. Rep. 94-295, 94th Cong., 1st Sess., 19 (1975). Defendants concede that the facts of the instant case are "identical to those in this case (*Gaillard*)" (Pet. Br. 25). Plaintiffs interpret this concession of the defendants to mean that they agree that the legislative history required Section 5 preclearance in this case.

result.[16] The Congressional intent to require preclearance prior to court approval of an apportionment plan for Kleberg County is manifest.

B. Operation Of The Voting Rights Act To The Instant Case

Under the operation of the Act, once a determination is made that the state or political subdivision is covered by the Act, a series of "coverage" questions are immediately presented. It is well settled law that Texas is a covered jurisdiction under the Voting Rights Act. *Briscoe v. Bell,* 432 U.S. 404 (1977).

The first coverage inquiry is whether the political subdivision "shall enact or seek to administer" a voting "standard, practice, or procedure". 42 U.S.C. § 1973c. In the instant case the defendants adopted a plan for submission to the district court as the plan the defendants would adopt if permitted to do so by the court (J.A. 40). This act of submitting the plan and informing the court that the defendants desired to implement the plan if permitted to do so by the court, is tantamount to enactment under the circumstances; and, at the very minimum, it qualifies as "seeking to administer" the plan by proposing that it be incorporated into the court's decree.[17] Hence,

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16. This Court has stated that "subsequent legislation declaring the intent of an earlier statute is entitled to significant weight" in statutory construction. *National Labor Relations Board v. Bell Aerospace Co.,* 416 U.S. 267, 275 (1975); *Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367, 380-381 (1969). Such consideration is especially appropriate where, as here, the Congressional intent is expressed in legislation extending, without change, the earlier statutory provision, which was enacted only five years earlier.

17. A finding that the defendants' action of submitting the plan to the district court is encompassed in the phrase "enact or seek to

the first coverage inquiry for the instant case has been answered in the affirmative.[18]

The second coverage inquiry is whether the political subdivision is proposing a voting "standard, practice or procedure". 42 U.S.C. § 1973c. The instant reapportionment plan falls under this language. *Georgia v. U.S.*, 411 U.S. 526 (1973); *Waller, supra; Morris, supra; Board of Supervisors of Warren County, Miss., supra;* and *Wise, supra.*

The third coverage inquiry is whether the proposed voting change was "different from that in force or effect on November 1, 1972." 42 U.S.C. § 1973c. Since the present apportionment plan was created in 1979, the third coverage inquiry is answered in the affirmative.

The fourth and final coverage question is whether the proposed voting change has been found by the United States District Court for the District of Columbia not to "have the effect of denying or abridging the right to vote on account of race or color" or whether the political subdivision has submitted the proposed voting change to the Attorney General "and the Attorney General has not interposed an objection within sixty days after such sub-

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administer" would be consistent with the legislative history of the 1975 extension which ". . . leaves no doubt but that Congress intended all electoral changes by political entities in covered jurisdictions to trigger federal scrutiny." *Dougherty Co., supra,* 439 U.S. at 46.

18. The only exception to these Section 5 coverage standards is stated in *Johnson, supra,* where the voting change or plan originates with the court itself and is embodied in the court's decree. The court-formulated reapportionment plan which the Supreme Court reviewed in *Johnson* was not subject to Section 5 because the covered jurisdiction did not "enact or seek to administer" it within the plain meaning of the Act.

mission." 42 U.S.C. § 1973c. Neither of these conditions have been satisfied by the defendants; therefore, Section 5 preclearance is required.

The operation of Section 5 in a reapportionment case requires the jurisdiction, in fulfillment of its legislative duty to submit a substitute plan, to obtain preclearance of its plan prior to submission to the reapportionment court for approval. This preclearance duty runs with the legislative body and not the judiciary. A legislative body cannot present the court with a valid legislative plan until it has met its responsibilities under Section 5. The role of the judiciary is simply to ensure that the legislative plan is a "valid legislative response." *Wise, supra,* 427 U.S. at 544. The constitutional validity of a plan cannot be reviewed by the district court "until clearance has been obtained." *Ibid.* 437 U.S. at 542; *Morris supra; Board of Supervisors, Warren Co., Miss., supra.*

C. Policy Arguments For The Application Of Section 5 Preclearance To The Instant Case

Defendants argue that Section 5 contemplates only voluntary departures from an existing apportionment plan and that otherwise, the voters are effectively disenfranchised pending the acceptance of a new plan and elected officials under the old apportionment plan could cause indefinite delays in an attempt to stay in office. (Pet. Br. 12)

Even without the advent of the Voting Rights Act there were judicial findings of unconstitutionality of apportionment plans to which the defendants' worst case delay scenario could apply. However, in the past, as in the present with the Voting Rights Act, the federal

judiciary has the power to order interim relief pending appropriate legislative action. *Burns, supra; Chapman, supra;* and *Johnson, supra.* Section 5 does not remove this power from the federal court. In the event that officials, elected under an invalidated plan, purposely delay implementation of a new plan, the court could order interim relief, which may include the adoption of plans submitted by the parties, including the plaintiffs. This factor alone would prompt most officials, no matter how recalcitrant, not to delay and thereby foreclose their opportunity to affect the resulting apportionment plan.

The defendants' argument that the Act is directed only toward voluntary changes and not court-precipated changes is simply not supported by legislative history.[19] Had Congress intended the Act to apply as defendants suggest, then surely there would be some expression made of this intention during the extension hearings in 1970 and 1975. Indeed, it would be anomalous to impose the special protecion of Section 5 on those jurisdictions which, on their own initiative, adopt reapportionment plans in an effort to meet constitutional standards, while exempting those which reapportion only in response to judicial intervention. Such an interpretation of Section 5 might have the consequence of encouraging covered jurisdictions to be derelict in reapportioning or correcting Fourteenth or Fifteenth Amendment violations in their

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19. See, S. Rep. No. 94-295, 94th Cong., 1st Sess. (1975); see also, *U.S. v. Board of Commissioners of Sheffield, Ala.*, 435 U.S. 110 (1978), where this Court said, "[W]hatever one might think of the other arguments advanced, the legislative background of the 1975 re-enactment is conclusive of the question before us. When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby." 435 U.S. at 134.

apportionment plans. If a covered jurisdiction were confronted with the choice of either acting to adopt a plan which corrects constitutional infirmities, subject to Section 5's special burden of proof, or not acting until ordered to do so by the court in the context of a privately initiated lawsuit, thus permitting the covered jurisdiction to avoid the responsibility of Section 5 submission, the jurisdiction might well choose the latter course. The result of the defendants' argument that Section 5 should apply only to voluntary changes by political subdivisions would be to nullify Section 5 by creating an avenue for the most resistant political subdivisions to circumvent the Act.

Defendants further suggest that Section 5 was designed to provide federal scrutiny of new voting procedures, and since the district court in the instant case found their plan constitutional, no further benefit could be derived by having Section 5 preclearance.[20] (Pet. Br. 13) That argument overlooks the purpose of the Act ". . . to banish the blight of racial discrimination in voting which has infected the electoral process in parts of our country for nearly a century", *South Carolina,* 383 U.S. at 308. Congress chose to accomplish this purpose through a ". . . complex scheme of stringent remedies aimed at areas where voting discrimination has been the most flagrant," *Ibid.* 383 U.S. at 315; because experience had shown such remedies to be necessary to eradicate the ". . . insidious and pervasive evil of (racial discrimination in voting) that had been perpetuated in certain parts of the country." *Ibid.* 38 U.S. at 309. To prevent any future

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20. Defendants' position is in direct opposition to this Court's ruling in *U.S. v. Board of Supervisors, Warren County, Miss., supra; Morris, supra; City of Rome v. U.S.,* ____U.S.____, 64 L.Ed. 2d 119, 100 S.Ct. ____ (1980).

circumvention of constitutional policy, Congress adopted Section 5, which provides that whenever a designated state or political subdivision wishes to change its voting laws, it must first demonstrate to a federal instrumentality that the change will be nondiscriminatory. "By freezing each covered jurisdiction's election procedures, Congress shifted the advantages of time and inertia from the perpetrators of the evil to its victims". *United States v. Board of Commissioners of Sheffield, Ala.*, 435 U.S. 110, 121 (1978). This is accomplished under the Act by the Section 5 preclearance procedure which switches the burden to the state or political subdivision to prove that its proposed change does not have the potential of discriminatory *effect* based on race, rather than placing the burden on the plaintiffs to prove that the proposed change has a discriminatory *purpose* in a suit brought under the Fourteenth and Fifteenth Amendments.

To adopt the defendants' argument that the local district court supplied sufficient "federal presence" and that Section 5 is not needed in the instant case, would be to place the advantage of time and inertia back on the perpetrators of the discrimination, and, equally seriously, it would invite states to circumvent changes through litigation. Defendants would have minority group members seek recourse from pernicious voting law changes in the one remedy Congress ". . . implicitly found to be unsatisfactory: repeated litigation." *Board of Commissioners of Sheffield, Ala.*, 435 U.S. at 125. Defendants not only ignore the express Congressional intent underlying the Act, but also ignore the decisions of this Court requiring Section 5 preclearance regardless of a previous finding of constitutionality by local district court. *Board*

of Supervisors, Warren County, Miss., supra; Morris, supra; City of Rome, supra.

Defendants' "federal presence" argument also overlooks the special role that the Attorney General and the District Court in the District of Columbia play in Section 5. Because of the creative genius which covered states and their political subdivisions used to frustrate federal court decrees, prior to the Voting Rights Act, Congress believed it necessary to have new voting changes examined by eyes that were experienced in the detection of sophisticated, racially discriminatory schemes and devices.

Congress vested primary jurisdiction to review new voting changes in the District Court for the District of Columbia and the Attorney General. They are the Congressionally selected federal experts who have exclusive jurisdiction to review these changes. Since the enactment of the Voting Rights Act, the Attorney General and the District Court for the District of Columbia have developed an expertise in this area that local district courts cannot parallel despite their utmost diligence. The express language of the Voting Rights Act would have to be violated, and clear Congressional intent ignored, if the defendants' "federal presence" argument is to be taken seriously. As the Senate Committee said in the 1975 extension hearings, "[N]ow is not the time to jeopardize this progress through the removal of those crucial preclearance protections." S. Rep. 94-295, 94th Cong., 1st Sess., 19 (1975).

Other policy considerations favor a finding that the Kleberg County plan is a "legislative" rather than "court-ordered" plan subject to Section 5 preclearance. "Redistricting and reapportionment is a legislative task which federal courts should make every effort not to pre-empt."

Wise, supra, 437 U.S. at 539; *Burns, supra;* and *Chapman, supra.* If the Court should decide to follow *East Carroll* and find that any gap in authority to make changes under state law, no matter how small, automatically makes a plan "court-ordered", then not only will the federal judiciary become more deeply involved in reapportionment, but also the legislative bodies will be required to surrender more of their rights to make policy decisions on behalf of their electorate. Since "court-ordered" plans are put to a more stringent standard of review than legislative plans, *Wise,* 437 U.S. at 541, reapportionment plans presented by legislative bodies that would otherwise pass constitutional muster will now fail. This result is readily apparent in the context of one-person, one-vote cases.

Legislatively devised plans that are categorized as "court-ordered" because of a technical restriction of state authority, may be found violative of the higher judicial standard of de minimus variation. Once a plan is found in violation, not only will the judiciary become more involved in drawing new apportionment plans, but important public policy objectives incorporated in the legislative plan will be compromised, *White v. Weiser,* 412 U.S. 783, 795 (1973). Additionally, this heightened judicial involvement will result in the unnecessary consumption of judicial resources, while increasing the number of election postponements and delays.

Another reason why this Court should not let Section 5 coverage turn on the issue of whether or not there is an imperfection of state authority is that such an exception could readily be manipulated by political subdivisions to circumvent coverage under the Act. In Texas, alone,

there are many ways a political subdivision could draft a reapportionment plan in violation of state law[21] in order to ". . . achieve . . . what it could not do itself without preclearance."[22] This prospect is especially alarming since Texas leads all other states in the number

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21. Any of the following restrictions of the Texas Election Code could be used in a political subdivision's plan in order to circumvent Section 5. Art. 2.04(1), Texas Election Code prohibits redistricting of election precincts other than during a July or August term of the Commissioners Court. Art. 2.04(2) prohibits formation of an election precinct out of two or more justice precincts, commissioners precincts, state senatorial districts, state representative districts, or congressional districts. No election precinct shall have less than 100, nor more than 2,000 voters; however, counties with a population less than 100,000 may establish election precincts of not less than 50 voters, and counties with a population less than 50,000 may establish precincts of less than 50 voters upon the petition of 25 or more registered voters within the county. There shall be a minimum of one election precinct wholly contained with each commissioner precinct. Art. 2.04(3) requires each ward to constitute an election precinct population of at least 10,000 unless the ward contains more than 2,000 voters. In case of the latter, the county is restricted from making a precinct out of parts of two wards; and no precinct shall include territory outside the corporate limits of the city or town unless the Commissioners Court finds that adjacent unincorporated territory is so situated that it cannot be formed into or included within an election precinct wholly outside the city, of suitable size and shape, and containing a suitable number of voters. Art. 2.04(5) limits the operative date of any of the aforementioned election precinct changes until the beginning of the following voting year. Art. 2.04(6) lists requirements for notice of intent to effect changes in counties with a population of 500,000 or more. If these notice requirements are not met, the precinct boundary changes will be nullified. Art. 2.05 permits a governing body of a municipality to combine two or more county election precincts into one municipal precinct, but the governing body is restricted from including parts of one county precinct into two municipal precincts. See also, Art. 5, § 18, *Tex. Const.* prohibits dividing a county into less than four commissioners precincts or more than eight commissioners precincts.

22. *U.S. v. Board of Commissioners, Sheffield, Ala.* 435 U.S. 110, 139 (1978) (Justice Powell, concurring in judgment).

of submissions made to the Attorney General,[23] and, since the total number of objections interposed to submissions from Texas ". . . almost exceeds the total number of objections sustained by any single state from the period of 1965-1978 . . ."[24]

Legislative authority of the political subdivision should not become a factor in deciding whether or not a plan is "legislative" or "court-ordered" for the purpose of Section 5 preclearance. When a political subdivision proposes a plan to the court, that act alone should trigger Section 5 coverage because the political subdivision is seeking to administer a voting change by having the court incorporate the subdivision's plan in its order. *East Carroll* should be read as turning on its own peculiar facts and this Court should adhere to its decision in *U.S. v. Board of Supervisors, Warren County, Miss., supra.* To rule otherwise would be contrary to the legislative history of the Voting Rights Act and would permit a judicially created exception to become a vehicle for the circumvention of the Act. Other undesirable results that would be caused by the adoption of such an exception to the Voting Rights Act would include: increased litigation and exhaustion of judicial resources, the compromise of state legislative policy choices when state plans fail to meet the higher standards of review for judicial plans, and the entanglement of the federal judiciary in the process of state reapportionment.

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23. Texas Advisory Committee to the U.S. Commission On Civil Rights, *A Report On The Participation Of Mexican-Americans, Blacks and Females In The Political Institutions And Processes In Texas,* 1968-1978, Vol. 1, 153 (1980).

24. *Ibid.* at 163.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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NO. 80-180

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1980

W.C. McDANIEL, ET AL.,

Petitioners,

vs.

JOSE SANCHEZ, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION

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MOTION FOR LEAVE TO FILE BRIEF, AMICUS CURIAE, OF THE AMERICAN CIVIL LIBERTIES UNION

Comes now the American Civil Liberties Union, through counsel, and moves the Court for leave to file a brief, amicus curiae, in support of the Respondents in the above-styled cause.[1]

The American Civil Liberties Union is a nationwide, non-partisan organization of over two hundred thousand members dedicated to protecting the fundamental rights of the people of the United States.

1. Counsel for petitioners declined to consent to the filing of this brief.

The Union has long supported judicial and legislative efforts to prevent the dilution as well as the denial of the right to vote. Since 1964 the Union has maintained a Southern Regional Office which has operated a Voting Rights Project. In support of the Union's goals, attorneys in that office have and continue to litigate numerous cases involving the elective franchise under the Fourteenth and Fifteenth Amendments, and particularly the Voting Rights Act of 1965.

The case sub judice may have ramifications for other litigation in jurisdictions where the local governing body may seek to adopt at-large districts, on jurisdictions not covered by §4 of the Voting Rights Act of 1965, and counsel for the parties herein may not focus on such issues because it does not directly affect them. Additionally, amicus curiae will discuss §3 of the Voting Rights Act which has not as yet been addressed by the parties.

Because of the Union's concerns over equality in voting, and because counsel for the parties may not focus on the issues mentioned above, the Union seeks leave to file this amicus curiae brief.

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus Curiae

The interest of amicus curiae, American Civil Liberties Union, is set forth in the motion for leave to file this brief, supra, p. ii.

Summary of Argument

When fashioning equitable relief where a Fourteenth Amendment violation has

been found in a voting apportionment case, the district court should first consider whether the state authorities have the legal authority to redistrict. Although the district court must provide the state authorities the opportunity to perform their redistricting function whenever practicable, if the state authorities are unable or unwilling to do so, consideration of equitable relief must not be limited to evaluation of a redistricting plan proposed by defendants. This allows undue influence to the factors chosen by defendants in formulating a plan where deference is not justified specifically because they failed to exercise and take responsibility for a legislative judgment.

The plan here was legislative because the defendants possessed the reapportioning authority, devised the plan encompassing their judgments, and informed the district court they would adopt it if permitted to do so. The district court erred in both setting and holding a hearing on the constitutionality of the plan. The judgment of the court of appeals was correct in ruling that the plan should have been submitted for pre-clearance under the Voting Rights Act of 1965, 42 U.S.C. §1973c.

In cases where the plan is court ordered and in cases where the jurisdiction is not covered by §4 of the Voting Rights Act, 42 U.S.C. §1973b, a reapportionment plan must not only be scrutinized for constitutional validity, but it cannot be enforced unless the district court or the Attorney General has determined under §3 of the Voting Rights Act, 42 U.S.C. §1973a(c), that the plan has no racial purpose or effect.

ARGUMENT

I.
THE PLAN HERE WAS LEGISLATIVE BECAUSE THE DEFENDANTS HAD THE LEGAL AUTHORITY TO REAPPORTION AND MADE THE DECISION TO ADOPT THE PLAN.

In determining whether a reapportionment plan is legislative or court ordered, two questions must be answered. First, do the state plan adopters, who in this case are the defendants, have the legal authority to adopt a legislative plan? Second, did they exercise their judgment, or was it the judgment of the district court, to adopt the plan?

A. Legislative Authority is Necessary.

Although Wise v. Lipscomb, 437 U.S. 535 (1978) does not sharply demarcate what is or is not a legislative plan, it did clearly hold that the authority to reapportion is critical.[1]

Here, there is no doubt that the defendants Commissioners' Court had the state authority to reapportion. Art. 5, Sec. 18 of the Texas Constitution provides for four single member districts and the authority

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1. Five justices rejected the proposition espoused in the opinion of Justices Powell, Burger, Blackmun and Rehnquist, that federal courts should accord constitutional deference to all reapportionment proposals by defendant political bodies without regard to whether those bodies had the legislative power to reapportion themselves under state law. The judgment of the Court was delivered by Justice White, joined by Justice Stewart. Part II of this opinion announces the rule that the defendant officials' proposed remedy should be treated with constitutional deference only if it is in fact a "legislative plan." 437 U.S. at 540. The opinion of Justice Marshall, joined by Justices Brennan and Stevens, agreed with Part II of the White opinion, 437 U.S. at 550, differing only as to whether or not the Dallas city council validly enacted the plan.

of the Commissioners to draw Commissioners' Court districts.

B. The Defendants Exercised Their Judgment in Adopting the Plan.

1. Whose judgment is imposed is the central issue.

Whether the judgment of the state authorized reapportioning body or the judgment of the district court was exercised is of critical importance. A simpler way of stating this factual question is--did the state authorized reapportioning body perform its duty or not. Resolution of the question is important because it affects what factors may be considered in adopting the plan and the burden of proof, the legal standards, and the forum to be used in validating the plan.

This Court has consistently mandated deference to legislative authorities in reapportionment matters because they and not the federal courts are best situated to identify and reconcile traditional state policies. Connor v. Finch, 431 U.S. 407 (1977). In performing its function, a state reapportioning body may constitutionally consider a variety of factors,

e.g., minimizing contests between incumbents, reflection of political party strength, experimentation with governmental forms, integrity of political subdivisions, compactness and contiguity of districts, natural and historic boundaries. Gaffney v. Cummings, 412 U.S. 735 (1973); Mahan v. Howell, 410 U.S. 315 (1973); Abate v. Mundt, 403 U.S. 182 (1971); Dusch v. Davis, 387 U.S. 112 (1967); Swann v. Adams, 385 U.S. 440 (1967); Burns v. Richardson, 384 U.S. 73 (1966). In an individual situation these factors may or may not justify certain district lines, but they do not in and of themselves establish invidiousness.

When a district court is faced with the task of devising and imposing a reapportionment plan because the legislative body is unable or unwilling to perform its responsibility, the court is bound to take into consideration many of these same factors.

> [I]n the context of legislative reapportionment, [a federal district court] should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the

> Federal Constitution, . . . White v. Weiser, 412 U.S. 783, 795 (1973).

Deference was due the factors in the state plan in White v. Weiser, though the plan itself was rejected, because it was duly enacted. Ibid. The district court should not "intrude upon state policy any more than necessary." Whitcomb v. Chavis, 403 U.S. 124, 160 (1971).

If compelled to fashion an apportionment remedy, a district court is limited in two ways differing from the reapportioning authority of a state. It must seek de minimus population variations and avoid the use of multi-member districts. Chapman v. Meier, 420 U.S. 1, 26-27 (1975).[1]

Most importantly, when fashioning a reapportionment remedy, the district court must act "in a manner 'free from any taint of arbitrariness or discrimination,' Roman v. Sincock, 377 U.S. 695, 710 (1964)"; Connor v. Finch, supra, 431 U.S. at 415.

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1. A state authority must, of course, also seek de minimus population variations, but may justify larger deviations "based on legitimate considerations incident to the effectuation of a rational state policy." Reynolds v. Sims, 377 U.S. 533, 579 (1964), quoted in Mahan v. Howell, 410 U.S. 315, 325 (197).

Responsibility for the reapportionment plan is the key to distinguishing a legislative plan from a court-ordered one. If the legislative body is unable or unwilling to perform its duty, the justification for deference to the state authority disappears. The responsibility is thrown to the district court which lacks "the political authoritativeness that the legislature can bring to the task." Connor v. Finch, supra, 431 U.S. at 415. This authoritativeness is lacking whether the legislative body completely fails to attempt to perform its duty, or whether it drafts a plan and tells the court it is unwilling to adopt the plan, and that the court may decide that this is the plan that should be adopted.

And, conversely, this authoritativeness is present when the legislative body drafts the plan, submits it to the court for a determination of its constitutional validity, and tells the court that if the plan is constitutional, the body will adopt it. Whether the formal adoption is before or after a determination of constitutional validity is of no consequence in deciding that the plan is

legislative rather than court-ordered.[1] The Court so ruled in Wise and this is the situation here.

2. The District Court in fact approved a legislative plan.

Defendants place great significance on the sentence of the district court's October 2, 1979 opinion by which they were "directed to submit a proposed new plan by the 13th of November, 1979." A-19.[2] They argue that this indicates that the plan was court ordered, and the district court apparently agreed with this argument. A-23.

There are two problems with this argument. First, the whole context of the October 2, 1979, opinion reveals that the district court was at that time directing that a time schedule be following during which time the defendants would be provided "a reasonable opportunity. . .to meet constitutional requirements by adopt-

1. Unless there is doubt, absent here, of the bona fides of defendants' expressed intent. The error in holding a hearing on constitutional validity on a legislative plan in a jurisdiction covered by §4 of the Voting Rights Act is discussed infra.

2. References to the petition for writ of certiorari appendix are cited as A-___; to the joint appendix as JA-___.

ing a substitute measure rather than for the federal court to devise and order into effect its own plan." This language from Wise v. Lipscomb, 437 U.S. 535 (1978), was quoted by the district court. Immediately thereafter, the district court said:

> If the Commissioners Court is unwilling or unable to present a proposed plan that will pass constitutional muster, it will then become the "unwelcome obligation" of the Court to do so. Connor v. Finch, 431 U.S. 407, 415. A-19.

In the very next paragraph of its opinion, the district court directed that new plan be submitted by a date certain and set a subsequent date "to determine the validity of the proposed new plan, . . ." Ibid.

This was the opinion in which the district court struck down the existing apportionment scheme. Earlier in the opinion the district court ruled:

> Defendants must therefore reapportion the current Commissioners Court precincts in order to bring the precincts in line with the one-man, one-vote principle. A-5.

That it was the defendants who should reapportion was reiterated later in the opinion, A-18, 19, in the Conclusion section, along with the above quoted direction to submit a plan.

Two conclusions must be drawn from these statements. The first is that the Section 5 submission issue was not being considered at that time. The second is that there is evidenced a presumption that the defendants would accept their responsibility and opportunity to reapportion themselves. The latter conclusion is inescapable. There is no indication in the record up to that point that defendants would be "unable or unwilling" to reapportion.

The second problem with the defendants' interpretation is that if the direction to submit a plan were to be interpreted as an indication that the district court was going to devise and impose its own plan, this was error, for this would have been a denial of the defendants' opportunity to perform their own responsibility. The more reasonable interpretation of the entire opinion is that the district court was providing that opportunity and explaining what would happen if the defendants failed to act.

But the district court confused the matter by setting a hearing date "to determine the validity of the proposed new plan." A-19. To hold hearings on a plan, which the court at that time could only presume

would be validly adopted by defendants, would be in conflict with Connor v. Waller, 421 U.S. 656 (1975). The logical construction of the district court's language is that it did not consider, at the time of this opinion, the holding of Connor v. Waller. It was instead intending to hold a hearing on the constitutionality of a reapportionment plan which it expected the defendants to devise and adopt.[1]

If the defendants have the state authority to apportion, and there is no indication they are unwilling to do so, directing them to exercise their authority cannot transform the plan they do adopt into a court ordered one. To construe the court's opinion in this manner would mean that when a district court directs defendants to perform their duty, and/or sets a deadline for that performance after

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1. The court directed a hearing on the plan which defendants were going to submit. It did not direct a hearing at which the court would choose a plan from several presented, or hear the arguments as to the validity of a court-devised plan. Nor did the court invite, much less direct, plaintiffs to submit a plan.

Furthermore, if the district court had properly directed defendants to seek pre-clearance prior to a hearing on the constitutional validity of the plan, the whole problem would not have arisen. Plaintiffs' rights under §5 cannot be denied because of the district court's error.

which the court will devise and impose its own plan, then even though the defendants perform their duty, it becomes a court ordered plan. Clearly this flies in the face of this Court's instructions that defendants are to be provided a reasonable opportunity to perform their function if practicable before a district court can act.

The district court's subsequent opinion of January 10, 1980, finding that the plan was not subject to pre-clearance because the "Commissioners Court did not reapportion the Commissioners' Court precincts on their own authority, but instead did so in response to a court order," A-23, is, unfortunately, not accompanied by any fact finding. While this opinion was issued after the issue had been joined as to whether or not pre-clearance was required (as the earlier opinion was not), it is no more enlightening as to the basis for the conclusion.

Defendants had not taken the position that they would refuse or were without authority to reapportion.[1] They at most

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1. They did not take an appeal from the earlier opinion which would then have been consistent with refusing to reapportion, intending to fight the finding of malapportionment on appeal.

indicated that they did not wish to reapportion, but if the court told them to do so they would rather do it themselves. JA-41, 42. While they may have failed to formally adopt the plan at the time of the hearing, the lead defendant testified that they would adopt it "if the Courts permits. . ." JA-40.

The evidence in the record thus shows only that they were willing to perform their legislative function, not that they were unable or unwilling to do so. They may have avoided their duties for ten years, preferring not to reapportion. But once the old plan was held unconstitutional, and defendants were provided the opportunity to perform their legislative function, they did so.

In deciding whether it was the court's or the defendants' judgment which shaped the plan, it is not sufficient solely to look at what factors shaped the plan. For example, Art. 5, sec. 18 of the Texas Constitution requires Commissioners' Court districts to be four in number, to be elected from single member districts and to have staggered terms. Certainly these factors are encompassed within the

plan. And if the court had drafted its own plan it would have been required to utilize these factors or explain why it did not. White v. Weiser, 412 U.S. 783 (1973). The mere utilization of state politics does not make this a legislative plan.

But this record overwhelmingly shows that it was the defendants' judgment about a number of factors that shaped the plan. They shifted the boundaries around the courthouse to protect the location of an office of an incumbent justice of the peace. JA-28, 35. At the direction of defendant McDaniel the plan was drawn "as much as possible along existing voting precincts. . .," JA-30, A-46. The commissioners' districts remained about the same outside the City of Kingsville, JA-35, and commissioner duties are confined largely to areas outside the city. JA-35, 36. "[E]ach commissioner examined [the plan] and of course they were interested in knowing how much came out of their precinct or how much went into their precinct. . ." JA-39. They preferred to redistrict themselves "rather than having Texas Rural Legal Aid come in and draw it for us." JA-42. They were aware of the

racial make-up of the districts under the plan. Judge McDaniel testified, "[Y]ou would naturally know, by living in Kingsville and living in Kleberg County, where the population lives and what the makeup is. . ." JA-43. And the plan drafter had similar knowledge. JA-32.

The legislative judgment here is indistinguishable in any meaningful way from Wise v. Lipscomb, 437 U.S. 535 (1978). In fact, indicia of legislative action is stronger here because there is no question of the necessity of a referendum. In both cases, an existing plan was held constitutionally defective and this was not appealed. Both defendants were provided the opportunity to submit a plan. Dallas drafted a plan and responded with a resolution that it would enact the plan by ordinance if the court approved the plan. The court orally approved the plan, the defendants did enact, and the court ruled in writing. While on appeal, the populace approved, providing the final, necessary or not, judgment of the persons in whom Texas law placed reapportioning authority.

The defendants here adopted a plan they had drafted for submission to the court for consideration of its constitu-

tional validity. Judge McDaniel was asked by his own attorney: "And you will adopt it if the Court permits you to do so?" He answered: "Yes, sir." JA-40. Presumably they followed up their expressed intent.

Nothing more could have been done to permit and in fact effectuate the legislative functioning of the body authorized by Texas law to redistrict. Like Wise v. Lipscomb, this was a legislative plan.

3. The decision to formulate and adopt a reapportionment plan and the decision of when it shall be implemented are separate questions.

To argue, as defendants suggest, that this plan is court ordered because the district court said the 1980 elections "should be conducted under this plan." A-23. ignores that dichotomy between adopting a plan and the timing of the implementation of the remedy. Situations arise in which a legislative body adopts a reapportionment plan, is required to receive §5 preclearance, but is subsequently unable to implement the plan for upcoming elections because of a conflicting interest expressed

in state law. A district court may then order the plan implemented immediately despite a particular state statute. This order may indeed not be subject to §5 pre-clearance under Connor v. Johnson, 402 U.S. 690 (1971), but it does not follow that the plan was not subject to pre-clearance.

This is the situation here. Defendants unquestionably had the authority under state law to reapportion commissioner precincts at any time. But, they argue, their plan altered election precincts which Art. 2.04.1., Texas Election Code, permits only during July or August.

The plan here split election precincts insofar as voting for commissioners, but it did not alter the precincts. Voters still were to go to the same polling place. JA-47, 48. Further, Judge McDaniel testified that voter registration cards which indicated voter precincts had already been mailed out to voters, JA-38, and whether or not a commissioner precinct split an election precinct, the voters would go to the same polling place. JA-48.

The purpose of Art. 2.04 was spelled out in Wilson v. Weller, 214 S.W.2d 473,

474 (Tex. Civ. App. 1948):

> If the statute be disregarded, confusion in election processes would result. The payment of poll taxes and the certifying of poll lists would be seriously interfered with. If election precinct lines could be changed immediately before elections, a virtual disfranchisement of voters might result. The purpose of this law is to prevent and not permit practices which tend to bring about uncertainty and disorder.

Texas law is thus concerned that changes in precinct boundaries may confuse the voters or result in their being omitted from poll lists. But a parallel concern was not deemed necessary to restrict the authority to redistrict commissioner precincts. It is significant that defendants did not even argue this statute as a basis for their lack of authority to reapportion until they filed their petition for rehearing in the court of appeals.[1]

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1. Defendants have not even argued that their action would be prohibited by Art. 2.04.2, which says that election precincts shall not be formed out of, inter alia, two or more commissioner precincts. For this statute, while stating this shall not be done, contemplates but that it may happen and limits the time in which it shall be corrected by redrawing election precinct lines. If

(Footnote continued on next page)

But even if defendants' position were correct that they could not do what they did to election precincts, they should have brought this to the district court's attention. The court could have inquired then as to whether or not a plan could be devised with acceptable deviations without splitting precincts. Instead the defendants made the legislative judgment, as Connor v. Finch, 431 U.S. 407, 415 (1977), says they should, that it was permissible and preferable to split an election precinct rather than to redraw the election precincts' lines. See, JA-48.[1]

A district court may, as part of the remedy, alter any number of election processes. It may reopen qualification dates, shorten terms, order special elections, etc., as the equities demand. But

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(Footnote continued from preceding page)
not corrected in September of the year, Texas law prefers that the election precincts continue to be split by a commission precinct in order to avoid confusion of the voters. This is exactly the circumstance that resulted here.

1. "The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." Connor v. Finch, 431 U.S. at 415.

to hold that because a single factor is altered, the whole nature of the adoption of a reapportionment plan is thus court ordered would defeat the intent of this Court in directing deference to legislative judgment to adopt an apportionment plan "whenever practicable." Wise v. Lipscomb, 437 U.S. 535 (1978). "Whenever practicable" did not mean "whenever in full adherence to every state election law." As long as the legislative body properly performs its legal authority in adopting a plan it remains legislative even though in order to provide relief a court may shorten deadlines, etc. In providing relief for a constitutional violation certain tangential state policies may be altered. Costello v. Wainwright, 430 U.S. 325 (1977). This is the circumstance found here.

II.

COURT APPROVAL OF A DEFENDANT DRAFTED PLAN UPON INQUIRY ONLY AS TO THE PLAN'S VALIDITY UNDER THE ONE-PERSON, ONE-VOTE STANDARD, ALLOWED UNDUE DEFERENCE TO THE PLAN IF IT WERE NOT LEGISLATIVE. IF A PLAN IS COURT ORDERED, AND PARTICULARLY IF THE DEFENDANTS' PLAN IS THE ONLY ONE CONSIDERED, SECTION 3 OF THE VOTING RIGHTS ACT, 42 U.S.C. §1973a(c), REQUIRES THAT THE COURT SHOULD NOT ENFORCE THE PLAN UNTIL IT WAS FOUND TO HAVE NO RACIAL PURPOSE OR EFFECT.

A. By Inquiring into Only the One-Person, One-Vote Validity of a Defendant-Proposed Plan, the Court Gave Undue Deference to Judgments that Were Not Entitled to Deference Because They Were Not Legislative.

The record here reflects that the district court placed the burden of proving the constitutional, one-person, one-vote validity of the plan on defendants. Since it was their plan, this was undoubtedly correct. Sims v. Amos, 365 F.Supp. 215 (M.D.Ala. 1973)(three-judge court), aff'd, 415 U.S. 902 (1974). (See questions presented, Wallace v. Sims, No. 73-961, 42 U.S.L.W. 3426.) The placing of this burden of proof on defendants is a further indication that the district court actually

considered the plan legislative. But the burden of proof was not placed on defendants that they would have had to carry either before the Attorney General or the United States District Court for the District of Columbia, that the plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . ." 42 U.S.C. §1973c. The district court opinion defeats the purposes of Congress and was properly reversed.

It is plain that the district court erred by providing time for the defendants to perform their function and simultaneously setting a hearing to determine the constitutional validity of the results. Connor v. Waller, 421 U.S. 656 (1975). And if it were at that time contemplating a court ordered plan, it should not have directed only the defendants to submit a plan, for this not only denies the other parties an equal opportunity to be heard on the issue of remedy, but it provides deference to defendants' preferences when deference was not justified because they were unwilling or unable to exercise a legislative judgment. Additionally, the court's inquiry was subse-

quently limited to the one-person, one-vote issue (and perhaps the dilution issue), and did not reach the issues of whether or not a court ordered plan should encompass the priorities which the defendants here were allowed.[1]

Only state interests expressed in statutes or constitutional provisions, or validly adopted by a legislative body are entitled to deference when a court devises

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1. One example of what should have been inquired into will suffice. The general structure of the commissioners' districts remained unchanged, following closely the old election precincts and commissioners' districts. The old plan overloaded one district with minority population, leaving three districts overwhelmingly white dominated. This carried forward into the new plan. But in a county with a forty-seven percent (47%) minority population, it might have been possible to draw a plan where that population would control one district and have a fair chance at influencing the election in a second. A federal district court would not be free to blindly accept a plan where a forty-seven percent minority has a chance of influencing the election in but one of five offices for the governing county authority; it might well have adopted a plan in which the resulting political configuration more closely reflected the potential voting strength of the minority population. This might not have been possible, but it should have been considered in a court ordered plan.

and imposes a plan. White v. Weiser, 412 U.S. 783 (1973). If the district court were agreeing, and if this Court agrees that the plan was not legislative because the defendants did not properly enact the plan, then the deference to the plan (without consideration of the plans proposed by plaintiffs) was error.

This was especially error here where it appears that one reason, if not the primary reason, the defendants did not enact the plan formally until after the court decided the plan was constitutional, was to avoid the necessity of pre-clearance under §5. To contenance this practice defeats the congressional intent in enacting the Voting Rights Act.

The district court opinion here has the result of defeating the coverage and protection of the Voting Rights Act, and it does so in circumstances most egregious and susceptible to abuse.

By drafting a plan with their own priorities, defendants had everything to gain--exemption from §5 coverage--and nothing to lose. They were allowed to make the judgments this Court has said they were entitled to only if they take legislative action with authority to do so

and if they accept responsibility for the plan.[1] If the court were to enter its own plan, defendants would not lose the right to elect to implement at-large districts, for Texas law does not allow that. They had only to submit a plan with deviations which the court would find de minimus and they would escape the pre-clearance procedure.

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1. The issue is not whether or not judgments should be made, but who is entitled to make them depends on who is responsible for making them. Even a court ordered plan is never free of political ramifications, if not political considerations. The very act of drawing district lines will likely determine the political complexion of an area. As Gaffney v. Cummings, 412 U.S. 735, 753 (1973) pointed out, the political profile of an area is well known or available from public records, and political consequences are easily gleaned. At bottom, "politics and political considerations are inseparable from districting and apportionment." 412 U.S. at 753.

B. Section 3 of the Voting Rights Act, 42 U.S.C. §1973a(c), Requires that When a Fourteenth or Fifteenth Amendment Violation Has Been Found in a Voting Case, Even a Remedy Devised and Imposed by the Court Shall Not Be Enforced Until Either the Court or the Attorney General Determines that the Remedy Has No Racial Purpose or Effect.

Following Connor v. Johnson, 402 U.S. 690 (1971), Congress foresaw the potential avoidance of the standard of proving a change had no racial purpose or effect by amending §3 of the Voting Rights Act in 1975 to expressly cover lawsuits brought by aggrieved persons. Section 3 requires a finding that a plan does not have a racial purpose or effect despite lack of §5 coverage, whether coverage is absent because a plan is court ordered or because the jurisdiction itself is not covered under §4.

The third paragraph of §3 is reproduced in the addendum hereto. Upon finding a voting violation under the Fourteenth or Fifteenth Amendments (as opposed to a §5 violation), in addition to whatever relief it may grant the district court shall retain jurisdiction, and while

it retains jurisdiction "no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced" until either the district court or the Attorney General determines that the change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.

Section 3 is nationwide in application, so it serves other congressional goals as well. But one thing it does require is that any remedy imposed by a court must also be determined to meet the same standards imposed by §5. It does not require, consistent with Connor v. Johnson, 402 U.S. 690 (1971), a court ordered plan to be submitted under §5, and it allows a court ordered plan to be put into effect where defendants would take no action to adopt a plan or submit a plan under §5. But this non-discriminatory standard was so important that Congress required that district courts apply this standard even to court ordered plans as well as a constitutional standard of one-person, one-vote.

That it applies to whatever remedy the court orders is made clear by the omission from §3, as contrasted with the language in §5, that the change be one which the state or political subdivision shall "enact or seek to administer." No change, from the time of commencement of the lawsuit, shall be enforced without meeting the statutory standard of §3, whether the source of the change is the state or the court.

Section 3 has not been much litigated, but it completes a statutory structure in which Congress sought to remove from individual citizens the burden of establishing that voting law changes had a racially discriminatory purpose or effect. It avoids pitting a district court finding against an administrative finding by the Attorney General where a district court is attempting to fashion relief, as well as avoids a hiatus in the authority to fashion a remedy where defendants fall or refuse to secure pre-clearance under §5.

Conclusion

The opinion of the Court of Appeals should be affirmed.

Respectfully submitted,

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ADDENDUM

Section 3 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973a:

(c) If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of

the voting guarantees set forth in section 1973b(f)(2) of this title. Provided, That such qualification, prerequisite, standard, practice or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

As amended Pub.L. 94-73, Title II, §§205, 206, Title IV, §§401, 410, Aug. 6, 1975, 89 Stat. 402, 404, 406.

No. 80-180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

W. C. MCDANIEL, *et al.*,
Petitioners,

v.

JOSE SANCHEZ, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law seeks leave to file the annexed brief as *amicus curiae*. The respondents have consented to the filing of such brief, but the petitioners have not.

The Lawyers' Committee was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. Protection of the voting rights of citizens has been an important aspect of the work of the Committee; it has pro-

vided legal representation to litigants in numerous voting rights cases for the past fifteen years.*

This case presents issues as to the procedure to be followed by a district court after it finds constitutional defects in the election system of a governmental agency which is within the coverage of the Voting Rights Act of 1965, as amended in 1975. The case has importance beyond its immediate facts because the ruling of the Court will affect future litigation in this area. In our view, the issue presented is both simpler and more basic than the issue as to whether the system devised after the initial ruling of the district court is properly characterized as legislative or judicial action. It is our view that the court below was correct in ruling that the district court should not have approved the plan offered by the defendant without clearance under Section 5 of the Voting Rights Act, whether or not the plan is deemed legislative or judicial. That, as we explicate in the annexed brief, was the understanding of Congress when it reenacted Section 5 of the Voting Rights Act and made it applicable to the region here involved in 1975.

We believe that we can present a perspective on the case which has not been presented by the petitioners and which may not be presented by respondents as to the procedure by which such intention of Congress can be implemented in accordance with the principles established by decisions of this Court.

The Lawyers' Committee accordingly seeks leave to file this brief as *amicus curiae* urging affirmance of the judgment below.

---

* For example, the Lawyers' Committee represented a class of black citizens of Mississippi in reapportionment litigation which was before this Court on several occasions: *Connor* v. *Johnson*, 402 U.S. 690 (1971); *Connor* v. *Williams*, 404 U.S. 549 (1972); *Connor* v. *Waller*, 421 U.S. 656 (1975); *Connor* v. *Coleman*, 425 U.S. 675 (1976); *Connor* v. *Finch*, 431 U.S. 407 (1977); *Connor* v. *Coleman*, 440 U.S. 612 (1979); *id.*, 441 U.S. 792 (1979); *United States* v. *Mississippi*, 48 U.S.L.W. 3530 (February 19, 1980).

WHEREFORE, the Lawyers' Committee for Civil Rights Under Law respectfully moves that its brief be filed in this case.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The interest of the Lawyers' Committee for Civil Rights Under Law in this matter is set out in the Motion for Leave to File this brief which is appended hereto.

STATEMENT

The essential facts are undisputed. In January, 1978, plaintiffs filed a class action challenging the method by which commissioners were elected to the Commissioners Court of Kleberg County, Texas. That court, consisting of a county judge and four commissioners, is the governing body of the county. The judge is elected county wide, but one commissioner is elected in each of the four precincts into which the county is divided. The commissioners serve staggered terms of four years, with two commissioners elected every two years.

Plaintiffs alleged that the precincts of Kleberg County, as constituted, violated the principle of "one man, one vote," and that the boundaries were drawn in a way which unconstitutionally diluted the votes of Mexican Americans.

After a trial, the district court found that there had been no unconstitutional dilution of the voting strength of Mexican Americans, but that reapportionment was necessary to correct population disparities. In its order of October 22, 1979, the court directed the defendants to submit a proposed new plan by November 13, 1979 and scheduled a hearing thereon for December 10, 1979.

At the hearing on December 10, the county presented to the court a plan which had been prepared by Dr. Robert T. Nash of the business school of Texas A & I University. The Commissioners had officially adopted Dr. Nash's proposal as the plan they would submit to the court. The plaintiffs, offering expert testimony, objected to the manner in which the plan distributed Mexican Americans among the four precincts, and argued that the plan should have been subjected to pre-clearance under Section 5 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973c (1976)). The district court held that pre-clearance was not required because the plan was

court-ordered, rather than legislative. Finding that the proposed plan remedied the malapportionment previously found, it directed that the 1980 primary and general elections should be conducted thereunder.

The court of appeals reversed, holding that the plan proposed by the County was subject to clearance under Section 5 of the Voting Rights Act, and that the district court erred in considering the constitutionality of the proposed plan before such clearance. *Sanchez* v. *McDaniel*, 615 F.2d 1023 (5th Cir. 1980). It relied on that portion of Justice White's opinion in *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978), which stated that, after finding an existing apportionment scheme unconstitutional, a federal court should afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure, rather than for a federal court to devise and order into effect its own plan. The court of appeals also ruled that a proposed reapportionment plan does not lose its status as a legislative plan merely because it is the product of litigation conducted in a federal forum.

SUMMARY OF ARGUMENT

The decision of the court below was correct, whether the plan at issue be deemed legislative or judicial.

1. Precise analysis, we believe, leads to the conclusion that the initial error of the district court lies in that part of its order of October 2, 1979 which directed the county to present a plan to the court in November, subject to a hearing in December, 1979. Under the decisions of this Court, after finding the existing system unconstitutional, the district court should have directed the county itself to fashion an appropriate plan pursuant to law. The plan drawn by the county, to be lawful, would have to be cleared under Section 5. Only thereafter

would the court be required to rule on its constitutionality, if a controversy between the parties continued. Congress, in extending Section 5 and making it applicable to the jurisdictions (including Texas) newly covered by the 1975 amendments, expressed its understanding that Section 5 would operate in this manner.

There are no circumstances in this case which would render inappropriate this traditional remedy which has the approval of numerous decisions of this Court. While some delay would result from the need for clearance, and possibly from the time limitations on changes in Texas law, the considerations which led Congress to prescribe the Section 5 clearance procedure would compensate for the delay. Moreover, the district court would have the power to order such interim relief as it deemed appropriate.

2. Even if the order of October 2 be accepted as correct, and as directing a judicial, rather than a legislative, plan, the district court should be held to have abused its discretion in putting the plan proposed by the county into effect without clearance. Congress intended Section 5 to apply, except under the most exigent circumstance, even where a plan was court ordered. It deemed it important that plans proposed by legislative bodies in the jurisdictions covered by the Voting Rights Act be examined by either the Attorney General or the District of Columbia Court, both because of their expertise and because they would not be subject to local pressure. These considerations apply whether the plan be adopted by the legislature initially or pursuant to court order. The possibilities of delay envisioned by petitioners could be controlled by the courts' power to order prompt action and to order interim relief, if needed.

ARGUMENT

The court below has held that the district court, after finding malapportionment, should not have considered the constitutionality of the new plan proposed by the county until the plan had been cleared under Section 5 of the Voting Rights Act as amended (42 U.S.C. § 1973c (1976)). As petitioners themselves recognize in their brief, the basic question in this case is the validity of that ruling, rather than the more legalistic question presented in their petition as to whether the plan should be deemed legislative or judicial action. We agree with petitioners (Pet. Br. 33) that "Section 5 applicability cannot be determined by resort simply to cases in which plans have been labeled 'court-ordered' or 'legislative' for these terms have been employed most frequently in cases in which the issue was the substantive acceptability of a reapportionment." It is our position that the district court should not have put the plan proposed by the county into effect until after it had been cleared under Section 5, regardless of whether the plan be deemd legislative or judicial.

I. ON FINDING MALAPPORTIONMENT, THE DISTRICT COURT SHOULD HAVE ORDERED THE COUNTY TO PREPARE A PROPER CORRECTIVE SYSTEM PURSUANT TO LAW WHICH WOULD HAVE INCLUDED CLEARANCE UNDER SECTION 5.

Since the time that this Court held, in *Baker* v. *Carr*, 369 U.S. 186 (1962), that federal courts have jurisdiction to determine claims of unconstitutional malapportionment, this Court has repeatedly ruled that "legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites

in a timely fashion after having had an adequate opportunity to do so." *Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964); *see also Burns* v. *Richardson*, 384 U.S. 73, 84-85 (1966); *Gaffney* v. *Cummings*, 412 U.S. 735, 749 (1973); *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975), *Connor* v. *Finch*, 431 U.S. 407, 414 (1977); *Wise* v. *Lipscomb*, *supra*, 437 U.S. at 535-39. As Justice White said in his opinion in *Wise* v. *Lipscomb*, *supra*, 437 U.S. at 540:[1]

> When a federal court declares an existing apportionment scheme unconstitutional, it is, therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution.

In our view, the basic error of the district court in this case lies in its failure to follow this fundamental directive. The district court, after finding malapportionment, instead of directing the county to submit a proposed new plan to it in November, should have directed the county to reapportion itself pursuant to law, reserving only the right to pass on the final plan after the legislative process was completed.[2]

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[1] While the quotation is from Justice White's opinion for himself and Justice Stewart, the principle is recognized in the opinon of Justice Powell, for himself and three additional Justices. See 437 U.S. at 548. Justice Marshall, who dissented in *Wise*, has recognized the general validity of the ruling in *Chapman* v. *Meier*, *supra*, that corrective measures should first be left to the legislature. *See Connor* v. *Coleman*, 440 U.S. 612, 622 (1979).

[2] The fact that plaintiffs did not appeal from the interlocutory order of October 2, 1979 in this respect (when the main thrust of the order, *i.e.*, that reapportionment was necessary, was in their

Had it done so, it is undisputed that the plan adopted by the legislature would have been subject to clearance under Section 5 of the Voting Rights Act. *Connor* v. *Finch, supra*, 431 U.S. at 412; *Connor* v. *Waller*, 421 U.S. 656 (1975). This Court has repeatedly held that clearance under Section 5 must be obtained in covered jurisdictions (which admittedly include Texas) even though the proposed change affects the system in only a minor way and was undertaken for reasons other than discrimination. *Perkins* v. *Matthews*, 400 U.S. 379, 387 (1971); *Allen* v. *State Board of Elections*, 393 U.S. 544, 566 (1969). If the district court had followed the repeated directions of this Court to keep the judiciary out of the legislative process as much as possible, the county could have decided whether it wished to follow Professor Nash's proposed plan and then submitted it to the Attorney General or the District of Columbia Court under Section 5. Only after such clearance would it be necessary to pass on any constitutional challenge to the legislative plan that might remain. Such a result is consistent with the Congressional understanding of how Section 5 would operate. As we discuss in detail below, Congress, when it extended the Voting Rights Act in 1975, made

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favor) does not preclude consideration of the validity of that order now. An appeal from a final judgment brings up all interlocutory orders, even if the earlier order could have been, but was not appealed. *Drayer* v. *Krasner*, 572 F.2d 348, 353 (2nd Cir.), *cert. denied*, 436 U.S. 948 (1978), and cases cited.

Although the court of appeals, in reaching a correct result, did not explicitly base its decision on the ground that the district court erred initially in failing to direct the county to correct the malapportionment legislatively (and therefore subject to Section 5 clearance), that ground for decision is encompassed in the court's holding that Section 5 clearance was required before the plan could go into effect. In any event, the issue, which is apparent on the record, is sufficiently important to warrant consideration by the Court. *See Schlesinger* v. *Councilman*, 420 U.S. 738, 743 (1975).

explicit its understanding that Section 5 would apply to plans which resulted from court orders, except in urgent circumstances. S. Rep. No. 94-295, 94th Cong., 1st Sess. 18-19, *reprinted in* [1975] U.S. CODE CONG. & ADM. NEWS 784-86.

There are, in this case, no circumstances which militate against the application of the principle, as phrased in Justice White's opinion in *Wise* v. *Lipscomb*, *supra* (437 U.S. at 539), that "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt." Petitioners assert that since, under Texas law, changes in the election precincts of a county may be made only during a July or August Term (*Wilson* v. *Weller*, 214 S.W.2d 473 (Tex. Ct. Civ. App. 1948)), "they were prohibited from reapportioning the county in the manner in which it was done, at the time it was prepared." (Pet. Br. 16).[3] They do not, however, and cannot argue that they are without power to make a proper legislative reapportionment at the proper term. At most, Texas law would prohibit the county's plan from becoming effective except during the specified months. The federal district court would clearly have authority to direct the district court to exercise its legislative judgment and submit the plan which it wished the county to adopt for clearance

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[3] Although the proper construction of Texas law was not decided below, *Wilson* does not appear to determine the authority of county commissioners to redistrict only *commissioners' precincts* outside the July or August Term. *Wilson* involved redistricting of both commissioners' and election precincts, *see* 214 S.W.2d at 474. The issue before this Court does not turn on the distinction, because the federal courts possess adequate equity power to remove temporary state law impediments to complete relief. But if the county commissioners do have authority to alter *commissioners' precincts* at any time under Texas law, then it would not even be necessary here for the district court to enter the sort of temporary relief we suggest in text, *infra*.

under Section 5, whether or not, under Texas law, the county had power to put the plan into effect at a time other than the term specified by state law. *See Burns* v. *Richardson*, *supra*, 384 U.S. at 85; *see also Wise* v. *Lipscomb*, *supra*, 437 U.S. at 548-49 (opinion of Powell, J.). The district court should have ordered the county to adopt a plan, and submit it for preclearance under Section 5, reserving the right then to pass on the constitutional challenge which might remain. The plan could then become effective at a proper time under Texas law.

Such a ruling would involve some delay beyond the December date for which the district court scheduled a hearing, but not necessarily any very great delay. The district court could have ordered the county to devise a plan and submit it to the Attorney General or District of Columbia Court for clearance by a date certain. If the Attorney General did not find the plan objectionable within 60 days, the plan would be ready to go into effect at the time permitted by Texas law. If, under Texas law, the plan could not go into effect until July or August, the district court, in the exercise of its equity powers, could order such temporary relief as it deemed appropriate. *See Connor* v. *Coleman*, 440 U.S. 612, 614 (1979); *Reynolds* v. *Sims*, *supra*, 377 U.S. at 586.

Resolution of the case might, of course, take longer if the Attorney General found the plan objectionable and the county had either to reconsider it or await a ruling from the District Court of the District of Columbia. But Congress knew, when it established the Section 5 procedure and limited jurisdiction to the District of Columbia, that some delay would necessarily result from that procedure. It felt that the expertise of the Attorney General or the District of Columbia Court and the absence of local pressure made the continuation of exclusive jurisdiction desirable. *See* 121 CONG. REC. 16900-01 (1975), where the House defeated an amendment which would have eliminated the exclusive jurisdiction

of the District of Columbia. See also remarks on the floor of the Senate, 121 CONG. REC. 24717 (1975). Congress was of the view that Section 5 clearance was necessary, whether plans were legislatively adopted or court-ordered, in order to make certain that any new plan did not dilute the rights of minority voters. While necessary delay is unfortunate, delay is not in and of itself a reason to depart from the traditional view that legislation should be left to the legislature.

II. EVEN IF THE COURT PROPERLY ORDERED A PLAN TO BE SUBMITTED TO IT INITIALLY, IT WAS AN ABUSE OF DISCRETION TO APPROVE THE PLAN WITHOUT CLEARANCE UNDER SECTION 5.

Even if the order of October 2, 1979, directing submission of a plan to the court in November, 1979, be accepted as correct, it was an abuse of discretion for the district court to pass upon the plan without requiring clearance under Section 5. The legislative history of the 1975 extension of the Voting Rights Act makes it clear that Congress intended that, except in unusual circumstances, all plans, whether legislative or court-ordered, be subject to Section 5 clearance. Recognition and adherence to that expressed policy would be in accord with the decisions of this Court and would further the public interest. The court below was therefore correct in holding that the district court should not have passed on the constitutionality of the proposed plan until after the plan had been cleared under Section 5.

1. The Senate Report on the bill which became Public Law 94-73, the Voting Rights Act of 1975, is explicit as to its understanding of the relationship of Section 5 to court-ordered reapportionment. (S. Rep. No. 94-295, 94th Cong., 1st Sess. 18-19, *reprinted in* [1975]

U.S. CODE CONG. & ADM. NEWS 784-86.)[4] Citing with approval the decision in *Connor* v. *Waller*, *supra*, the report stated that the ruling "is consistent with the Committee's objective to utilize a form of primary jurisdiction for Section 5 review under which courts dealing with voting discrimination should defer in the first instance to the Attorney General or to the District of Columbia District Court." The report continues:

> Thus, for example, where a federal district court holds unconstitutional an apportionment plan which predates the effective date of coverage under the Voting Rights Act, any subsequent plan ordinarily would be subject to Section 5 review. In the typical case, the court either will direct the government body to adopt a new plan and present it to the court for consideration or itself choose a plan from among those presented by the various parties to the litigation. In either situation, the court should defer its consideration—or selection among—any plans presented to it until such time as the plans have been submitted for Section 5 review. Only after such review should the district court proceed to any fourteenth or fifteenth amendment question that may be raised.

(S. Rep., *supra*, at 18-19; [1975] U.S. CODE CONG. & ADM. NEWS at 784-85.)

The report interpreted this Court's decision in *Connor* v. *Johnson*, 402 U.S. 690 (1971) as dealing with the exceptional situation where, because of exigent circumstances, a court is required to fashion a plan itself. Even in that situation, the report pointed out, in fashioning

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[4] The report is on S. 1278 whereas the measure finally enacted arose out of H.R. 6219. The House bill was, however, essentially the same as S. 1279 and was used as the basis for debate and enactment by the Senate because of the need for expedition before the Voting Rights Act would expire. *See* 121 CONG. REC. 24116 (1975.)

the plan, a court should follow Section 5 standards. And it indicated the Committee's view that the exceptions should be rare by pointing out that, even where a court adopted a plan without clearance, if a state should later legislatively adopt the court-fashioned plan, Section 5 would apply. The reason for the primacy of Section 5, the report stated, was that the Attorney General and the District of Columbia Court, "as the experts in the area, have developed familiarity with the impact of discriminatory voting systems, and it is they who should assess the discriminatory impact of a system." S. Rep., *supra*, at 19.

While the House Report (H.R. Rep. No. 94-196) is not as explicit as the Senate report with respect to the relationship of Section 5 to orders in litigated cases, the House Report does make clear the importance which the House, as well as the Senate, attached to Section 5. The House Report stated (at 10) that continuation of Section 5 was necessary "to insure that any future practices will be free of discriminatory purpose and effect." It pointed out (at 11) that it would be ironical if the decisions mandating "one man, one vote" would be used to undercut the gains made by minorities, and stated that Section 5 was needed to make certain that there would be continued progress in this area. Similar remarks, essentially repeating the statements in the House Report, were made by supporters of the bill on the floor of the House. *See* 121 CONG. REC. 16244, 16247-48, 16251 (1975). An amendment to eliminate the requirement that Section 5 clearance be judicially obtained only from the District of Columbia court was defeated, 121 CONG. REC. 16900-01 (1975). Those opposing the amendment pointed out that concentration of such cases in the District of Columbia was needed, both to resist local pressure and to make use of the expertise acquired by the District of Columbia Court.

Since, as the Senate report noted (S. Rep., *supra*, at 16), it was only after 1970 that Section 5 came into extensive use and its importance was recognized, the reports and debates on the 1975 amendments were the first real opportunity Congress had to examine the actual operation of Section 5. Its understanding of the operation of that section, at a time when it not only extended its life, but made it applicable to jurisdictions (including Texas) not previously covered, renders this legislative history very pertinent to the judicial interpretation of Section 5.

2. Policy considerations, as well as the legislative history, dictate that this Court should direct the lower courts to fulfill the expectations of Congress that new apportionment plans in the area covered by the Voting Rights Act be subject to Section 5 clearance, whether resulting from legislative initiative or court orders. As discussed in Point I, such an approach is consistent with the established judicial policy of leaving the legislative process as much as possible to the legislature. On the other hand, Congress, when it enacted Section 5 (see *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966)), and when it extended it thereafter, decided that new plans could so subtly mask discrimination that a centralized body, applying consistent standards, was needed to make sure that reapportionment was not used as a means of disenfranchising minorities. It also, as discussed above, decided that it was necessary to centralize the authority to pass on plans in the District of Columbia, not only because of the expertise which that court had developed, but also because it felt that local judges would be subject to local prejudices and local pressure. Those considerations apply whether a new plan be legislatively adopted or court-ordered. Whatever delay may be involved in Section 5 clearance, Congress obviously thought that the need for consideration by a body with

consistent standards, removed from local pressures, was more important.

Petitioners argue that requiring clearance may result in indefinite delay by a recalcitrant legislature. However, a court is not, by requiring clearance, deprived of its general equity power to take measures to overcome undue delay. *See* pp. 9-10 *supra*. The suggestion that Section 5 should not apply to a district where the existing plan has already been deemed unconstitutional, since this may necessitate continuation, for a time, of a system officially adjudged improper, is not a convincing reason to disregard the clear intent of Congress. As discussed above, in most cases, where a legislature acts in good faith, clearance from the Attorney General could be obtained in short order. And even if some delay is involved, it is better to have an old bad system continued for a short time (*see Reynolds* v. *Sims*, *supra*, 377 U.S. at 585) than to have a new bad system put into effect for the indefinite future. It was the Congressional judgment that Section 5 clearance was essential to protect the rights of minorities under the Voting Rights Act. This Court should direct district courts to effectuate that Congressional intention, particularly since it is in accord with the judicial policy of avoiding, as much as possible, involving the courts in the legislative process.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, absent compliance with the preclearance requirements of Section 5 of the Voting Rights Act of 1965, a federal district court may adopt and order into effect a reapportionment plan submitted to it on behalf of the local legislative body of a jurisdiction covered by the Act.

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INTEREST OF THE UNITED STATES

This case raises an important question concerning the scope of the Attorney General's enforcement responsibilities under Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c). Under Section 5, the Attorney General must review changes in election laws submitted by covered jurisdictions to determine whether such changes have either the purpose or the effect of denying or abridging the right to vote on account of race or color. The Attorney General also has authority under the Act to initiate suits to prevent implementation of changes in election laws prior to compliance with the preclearance procedures of Section 5. The Court's resolution of the question presented here will directly affect these responsibilities. The United States has previously participated either as a party or as amicus curiae in virtually all Supreme Court cases involving the Voting Rights Act, including two previous cases dealing with the issues presented here, *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976), and *Wise* v. *Lipscomb*, 437 U.S. 535 (1978).

STATEMENT

Kleberg County is a rural county in Texas that had a population of 33,166 in 1970. Of that number, 44% were Mexican-American and 3% were Black (Pet. App. 3, 8). The Commissioners Court is the governing body of the county, and consists of one county judge and four county commissioners.[1] Each commissioner is elected from a separate commissioner precinct (Pet. App. 3-4).[2] An apportionment plan for the commissioner precincts, based on county voter registration lists, was implemented in 1968. The precincts were not reapportioned following the 1970 Census (Pet. App. 5). If the county had been

[1] The Commissioners Court members serve for four years, with two commissioners elected every two years.

[2] The county judge is elected from the county at large.

divided into equal precincts on the basis of the 1970 Census, each precinct would have had a population of 8,291. In fact, Precinct 1, the largest precinct, had a population of 9,928, or 19.73% more than the ideal, while Precinct 4, the smallest precinct, had a population of 6,702, or 19.17% less than the ideal. The maximum deviation from the largest precinct to the smallest precinct was therefore 38.9% (Pet. App. 5).[3]

On January 26, 1978, respondents filed this voting rights suit against the county judge, the county commissioners and other county officials, seeking injunctive and declaratory relief under 42 U.S.C. 1983 and 28 U.S.C. 2201-2202. The complaint alleged two separate claims under the Fourteenth Amendment: that the commissioner precincts were malapportioned in violation of the constitutional principle of one-person, one-vote; and that the apportionment plan unconstitutionally diluted the voting power of Mexican-Americans in Kleberg County by concentrating the Mexican-American population in Precinct 4 (Pet. App. 1).[4]

On February 3, 1978, a hearing was held on the respondents' motion for a preliminary injunction to enjoin the May 1978 primary elections for county commissioners (Pet. App. 2). The testimony at the hearing was limited to the malapportionment claim (Pet. App. 3). The peti-

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[3] The population according to the 1970 Census in each precinct under the 1968 reapportionment plan is as follows (Pet. App. 8):

Precinct	Total Population	Mexican-American		Anglo		Black	
		No.	%	No.	%	No.	%
1	9,928	4,002	40.3	5,926	59.7	0	0
2	9,269	2,865	30.9	6,404	69.1	0	0
3	7,267	1,337	18.4	4,932	68.0	998	13.6
4	6,702	6,413	95.7	288	4.3	0	0

[4] Prior to 1968, no Mexican-American had ever been elected to the Commissioners Court. Since the 1968 reapportionment, Mexican-Americans have been elected to the commissioner position in Precinct 4, but they have not held any other positions in the Commissioners Court (Pet. App. 17).

tioners defended the 1968 apportionment plan by challenging the accuracy of the figures introduced by the respondents to show malapportionment (*ibid.*). Ten days later, the district court denied the motion, finding that the statistical evidence was too "uncertain" to warrant interim relief (District Court Opinion of Feb. 13, 1978). On August 14, 1978, the Fifth Circuit vacated this decision and remanded for reconsideration in light of *Lister* v. *Commissioners Court*, 566 F.2d 490 (1978), which held that a Commissioners Court "had a clear duty to reapportion on the basis of the 1970 census." 566 F.2d at 492.

Following remand, on October 30 and 31, 1978, the district court held a two-day trial (Pet. App. 3). Most of the testimony concerned the claim of voting dilution (Pet. App. 5). Approximately one year later, on October 2, 1979, the district court issued an opinion concluding that the 1968 apportionment plan for county commissioners violated the constitutional principle of one-person, one-vote (Pet. App. 4-5). Noting that "[t]he initial burden of fashioning a constitutionally permissible remedy is on the County Commissioners Court," the court instructed the petitioners "to submit a proposed new plan by the 13th day of November, 1979," and scheduled a hearing for December 10, 1979 (Pet. App. 19). On the claim of voting dilution, the district court found that Mexican-Americans in Kleberg County have historically suffered from racial discrimination in voting and in other areas (Pet. App. 16-18). Analyzing the evidence in light of the standards articulated in *Zimmer* v. *McKeithen*, 485 F.2d 1279 (5th Cir. 1973), the court nevertheless concluded that the respondents failed to meet their burden of proving that the 1968 apportionment plan precluded effective participation by Mexican-Americans in the election process (Pet. App. 18).

Pursuant to the district court's instructions, the Commissioners Court submitted a proposed plan (Pet. App. 22). The population of the precincts under the proposal ranged from 8,305 in Precinct 1 to 8,336 in Precinct 4,

with a maximum deviation of less than one-half percent (J.A. 20-21).[5] The commissioners employed a statistician, Dr. Robert T. Nash, to assist them in preparing the new plan (J.A. 14, 24-25); they instructed him to redraw the commissioner precinct boundaries to achieve equality of population and to attempt "to keep the voting precincts together as much as possible and to break as few as he could" (J.A. 25, 34, 46). They also provided him with population data, which he used to draw up the plan (J.A. 14-15, 34). After at least three meetings with the commissioners, Dr. Nash completed the plan and presented it at a formal meeting of the Commissioners Court (J.A. 25-28). The commissioners reviewed the plan and asked Dr. Nash to redraw the boundary between Precincts 1 and 4 so that the county courthouse would be located in Precinct 1 rather than Precinct 4 (J.A. 28, 39, 46). The plan was then "officially adopted at the Commissioners' Court meeting to be presented to the court" (J.A. 40; App. 1a-3a, *infra*). When asked why the Commissioners Court did not consider either of two reapportionment plans proposed by respondents, County Judge McDaniel testified that the commissioners preferred to "redistrict ourselves", and did not want Dr. Nash to "be polluted by any other plans that might be presented" (J.A. 42).

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[5] The following chart shows the populations of each precinct under the 1968 reapportionment plan and the plan submitted by the Commissioners Court (J.A. 77-78):

Precinct		1968 Plan	1979 Plan
1	Anglo	59.7	72.0
	Mex.-Amer.	40.4	24.0
	Other	0	4.0
2	Anglo	69.1	60.0
	Mex.-Amer.	30.9	38.5
	Other	0	1.5
3	Anglo	68.0	76.0
	Mex.-Amer.	18.4	11.0
	Black	13.6	13.0
	Other	0	.2
4	Anglo	4.3	8.7
	Mex.-Amer.	95.7	91
	Other	0	.3

At the December 10 hearing, respondents raised three objections to the proposed plan. First, they challenged the use of population data from insurance records rather than from the 1970 Census as the basis for apportioning part of the county (J.A. 23-24, 71-72). Second, they argued that the plan was a legislative reapportionment plan that had to be precleared under Section 5 of the Voting Rights Act of 1965 before the district court could consider its constitutionality under the Fourteenth Amendment (J.A. 10-12, 72-73). In connection with this claim, respondents demonstrated that the proposed plan reduced the voting strength of Mexican-Americans in Precinct 1 from 40 to 24 percent (J.A. 51-54, 77-78) by moving part of Precinct 1 into Precinct 4 (J.A. 30, 43).[6] Finally, assuming arguendo that the proposed plan was not subject to preclearance, respondents argued that the plan impermissibly diluted the voting strength of Mexican-Americans in the county in violation of the remedial standards governing judicial reapportionment plans (J.A. 10-13; see also Memorandum in Support of Injunction Pending Appeal 7-9).

On January 14, 1980, the district court held that the proposed apportionment plan remedied the previous malapportionment and ordered it into effect for the upcoming elections for Precincts 1 and 3 (Pet. App. 22). Relying on *East Carroll Parish School Bd.* v. *Marshall*, *supra*, 424 U.S. at 638-639 n.6, it concluded that the plan was judicial rather than legislative and therefore was not subject to Section 5 of the Voting Rights Act of 1965 (Pet. App. 22-23). The court did not address respondents' claim that the new plan impermissibly diminished

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[6] As a practical matter, the reapportionment plan only affected Precincts 1 and 3, because the upcoming 1980 election only involved those precincts (J.A. 36), and the commissioners "figured that after the 1980 census comes out, we will have to redistrict again" (J.A. 47). For that reason, respondents argued that these precincts should be considered in isolation and that the apparent increase in the voting strength of Mexican-Americans in Precinct 2 could not be considered to offset the adverse effect of the change in Precinct 1 (see note 5, *supra*).

the voting strength of Mexican-Americans in Precinct 1 (see Pet. App. 21-23).

In a per curiam opinion issued on April 14, 1980, the court of appeals vacated the district court's order. Citing *Wise* v. *Lipscomb*, *supra*, the court held that the plan was legislative because it had been devised by the local legislative body to fulfill its "legislative responsibility" and did not lose that character "merely because it is the product of litigation conducted in a federal forum" (Pet. App. 28). It therefore held that the plan was subject to preclearance under Section 5 and remanded the case to the district court for appropriate relief (Pet. App. 26-29).

The district court directed the petitioners to commence preclearance procedures (Pet. App. 34-35). On August 14, 1980, Justice Powell stayed the Fifth Circuit's judgment (*McDaniel* v. *Sanchez*, No. 80-180), stating that *East Carroll Parish*, *supra*, and *Wise* v. *Lipscomb*, *supra*, appears to be inconsistent and "fall considerably short of providing clear guidance to the courts that initially address this difficult issue" (slip op. 4). This Court granted certiorari on October 14, 1980.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue in this case is whether the court of appeals properly required preclearance under Section 5 of the Voting Rights Act of 1965 of a reapportionment plan formulated by the Commissioners Court of Kleberg County, Texas,[7] prior to its submission to and approval by a

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[7] The plan clearly is within the scope of Section 5 (42 U.S.C. 1973c). It is undisputed that Kleberg County is a covered jurisdiction within the meaning of Section 4(a) of the Act, 42 U.S.C. 1973b(a), to which the provisions of Section 5 apply. See page 11, *infra*; 28 C.F.R. 55.24, App. It is also undisputed that a reapportionment plan qualifies as a "standard, practice, or procedure with respect to voting" covered by Section 5. *Georgia* v. *United States*, 411 U.S. 526, 529 (1973). Finally, it is clear that the 1979 reapportionment plan differs from the one in effect on November 1, 1972. See pages 1-5, *supra*.

federal district court.[8] The district court invalidated the preexisting apportionment scheme, which consisted of four single-member commissioner precincts, as violative of the Fourteenth Amendment principle of one-person, one-vote. Rather than devising its own remedial plan, the court deferred to the commissioners' judgment and directed them to "fashion[] a constitutionally permissible remedy" (Pet. App. 19). The Commissioners Court then exercised its independent legislative judgment in formulating a redistricting plan for the four commissioner precincts, which it submitted to the district court for approval. The court of appeals correctly held that this plan should have been precleared under Section 5 before being submitted to the district court.[9]

Section 5 was enacted to provide special protection to the voting rights of minorities in jurisdictions with long

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[8] Since the court of appeals ruled that the proposed plan should have been precleared prior to its submission to the district court, it did not address respondents' alternative claim that the plan was inadequate under the standards applicable to court-approved reapportionment plans (Pet. App. 26-29). If this Court reverses the Fifth Circuit's judgment, it would be appropriate for that court to address this claim on remand.

[9] The district court properly refused to grant respondent's motion to convene a three-judge court to consider the applicability of Section 5 to the commissioners' proposed plan (Pet. App. 24). Section 5 provides that "[a]ny action *under this section* shall be heard and determined by a court of three judges * * * and any appeal shall lie to the Supreme Court." 42 U.S.C. 1973c (emphasis added). Since the complaint in this case does not allege a claim under Section 5, the case is not within the language of the statute and therefore a three-judge court was not required. Cf. *Allen* v. *State Board of Elections*, 393 U.S. 544, 560-563 (1969). This Court has noted that statutes requiring three-judge courts should be narrowly construed because such courts place a burden on the federal court system, frequently delay issues requiring swift resolution and deprive this Court of intermediate appellate review. *Swift & Co.* v. *Wickham*, 382 U.S. 111, 128 (1965).

Of course, the preclearance requirements of Section 5 apply to all changes in voting procedures by covered jurisdictions, not just those that are the subject of a Section 5 complaint. 42 U.S.C. 1973c; see pages 11-17, *infra*.

histories of voting discrimination. This Court has accordingly been reluctant to permit covered jurisdictions to circumvent the requirements of Section 5. Requiring preclearance of the plan proposed by the Commissioners Court here similarly avoids such circumvention and furthers the remedial purposes of the Act. It is, moreover, consistent with the Act's plain language and legislative history, and with this Court's decision in *Wise* v. *Lipscomb*, 437 U.S. 535 (1978).

Section 5 requires preclearance of all voting changes proposed by covered jurisdictions—whether the jurisdiction "enacts" or otherwise "seeks to administer" the change. If that language were not sufficiently clear on its face, Congress expressly noted, when it reenacted Section 5 in 1975, that preclearance is required whenever the new plan is proposed by the governmental body in the course of litigation (S. Rep. No. 94-295, 94th Cong., 1st Sess. 18-19 (1975). Nothing in either the statutory language or the legislative history suggests that preclearance is required only when the legislature voluntarily changes voting procedures, or that legislatures operating under unconstitutional apportionment schemes can avoid preclearance simply by awaiting suit and then proposing a reapportionment plan to the district court.

Section 5 represents a congressional balance between the need for special protection of voting rights and the possible delay and inefficiency of the centralization of responsibility for preclearance review in the Attorney General and the District of Columbia District Court. Although the reapportionment court must stay its proceedings pending completion of the preclearance process, the statute provides for an expedited preclearance procedure, and if even that procedure is too lengthy in particular circumstances, the district court always has the option of implementing its own interim plan. On the other side of the balance, Congress concluded that centralization of responsibility for preclearance was necessary to assure that the protection of the voting rights of minorities is given the high priority (under uniform

standards) that Congress concluded was appropriate when covered jurisdictions are involved.

The Court's decision in *Wise* v. *Lipscomb*, *supra*, not only supports the court of appeals' interpretation of Section 5, but it also provides an independent basis for affirming the decision below. Thus, in *Wise*, both Justice White, announcing the Court's judgment, and Justice Powell, concurring, focused on the legislative origin of the plan at issue there in concluding that it should be treated as a legislative, rather than a judicial plan. They differed only in the importance that they attached to the governing body's authority, under local law, to redistrict itself. But whatever the importance of this factor, the Commissioners Court here had at least as much authority to reapportion itself as the city council in *Wise*.

Although *Wise* dealt with the question whether the plan at issue there was legislative or judicial for purposes of determining the applicable standard of judicial review, the same analysis of the difference between the two types of plans applies in cases such as this, where the issue is whether preclearance is necessary. Only by applying the same standard for both purposes can there be assurance that reapportionment plans implemented by jurisdictions covered by Section 5 will be subject to either the special remedial standards applicable to judicially devised plans or the special scrutiny prescribed by Section 5.

ARGUMENT

I.

CONGRESS INTENDED REAPPORTIONMENT PLANS FORMULATED BY COVERED JURISDICTIONS IN THE COURSE OF LITIGATION TO BE PRECLEARED UNDER SECTION 5 OF THE VOTING RIGHTS ACT OF 1965

The Voting Rights Act of 1965 was designed to remedy the "insidious and pervasive evil" of discrimination in voting, "which had been perpetuated in certain parts of

our country through unremitting and ingenious defiance of the Constitution." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 309 (1966). Based on extensive hearings, Congress found that suits to enforce constitutional rights did not offer adequate protection because litigation had been too slow and, even when favorable decisions were finally obtained, affected jurisdictions "merely switched to discriminatory devices not covered by the federal decrees * * *" (*id.* at 314). Concluding that "sterner and more elaborate measures [were necessary]" (*id.* at 309), Congress adopted a "complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant" (*id.* at 315).

Section 4 of the Act determines the jurisdictions that are subject to the Act's special protections. See *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110, 118-121 (1978). The coverage formula under Section 4 is based on Congress's determination that jurisdictions meeting the stated criteria have previously engaged in pervasive discrimination in voting and are likely to continue to circumvent constitutional requirements (*id.* at 121).[10]

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[10] As originally enacted in 1965, Section 4 applied to any state or political subdivision for which (1) the Attorney General has determined that on November 1, 1964, it maintained a "test or device," and (2) the Director of the Census has determined that less than 50% of its voting-age residents were registered for, or voted in, the presidential election of November 1964. The phrase "test or device" was defined to include the following requirements for registration or voting: literacy and educational achievement tests; good moral character requirements; and voucher systems. See 42 U.S.C. 1973b(c); *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 317-318. When the Act was amended and reenacted in 1970, the coverage formula of Section 4 was expanded to include November 1968 voting and registration results; the definition of "test or device" in Section 4(c) was retained. 84 Stat. 315.

In Texas, less than 50% of the voting-age population voted in the presidential elections in 1964 and 1968, but Texas was not covered by Section 4 because it did not use a "test or device" as defined in Section 4(c) of the 1965 and 1970 Acts. See H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 17 (1975); S. Rep. No. 94-295, 94th Cong., 1st Sess. 25 (1975).

Based on "overwhelming evidence" of "the ingenuity and prevalence of discriminatory practices that have been used to dilute the voting strength and otherwise affect the voting rights of language minorities," (H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 22, 26-27 (1975); S. Rep. No. 94-295, 94th Cong., 1st Sess. 35, 39 (1975)), Congress in 1975 expanded the coverage formula to include the use of English language registration or voting materials in any state or political subdivison in which the Director of the Census has determined that more than 5% of the voting-age citizens are members of a single language minority. 89 Stat. 400-402; 42 U.S.C. 1973b (f)(1). This change was principally designed to bring Texas within the preclearance requirements of Section 5 because of that state's long history of voting discrimination against blacks and Mexican-Americans. *Briscoe* v. *Bell*, 432 U.S. 404, 406 (1977); H.R. Rep. No. 94-196, *supra*, at 17-22; S. Rep. No. 94-295, *supra*, at 25-30.

One of the Act's primary means of affording special protection for Fourteenth Amendment rights is Section 5. Under Section 5, jurisdictions covered under Section 4 may not "enact or seek to administer" any "different" voting qualification or procedure without submitting the change for review either to a three-judge panel of the United States District Court for the District of Columbia or to the Attorney General (42 U.S.C. 1973c). In these proceedings, the covered jurisdiction bears the burden of demonstrating that the proposed change in voting procedures "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" (*ibid.*) or because of membership in a "language minority group" (42 U.S.C. 1973b (f)(2), 1973*l*(c)(3)). In contrast to a suit to enforce constitutional voting rights directly, under the Act proof of a constitutional violation is unnecessary to bar the use of new voting procedures. The burden of proof is on the covered jurisdiction rather than on those challenging the procedures, and the jurisdiction must prove the absence of both discriminatory purpose and discrimina-

tory effect. Compare *City of Rome* v. *United States*, No. 78-1840 (Apr. 22, 1980) with *City of Mobile* v. *Bolden*, No. 77-1844 (Apr. 22, 1980). Cf. *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 157 (1977).[11]

Consistent with the protective and remedial purposes of Section 5, this Court has repeatedly interpreted that Section to give it "the broadest possible scope." *Allen* v. *State Board of Elections*, 393 U.S. 544, 566-567 (1969); *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110 (1978); *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32 (1978); *Georgia* v. *United States*, 411 U.S. 526 (1973); *Perkins* v. *Matthews*, 400 U.S. 379 (1971). Section 5 should again be broadly construed in this case to require preclearance of a reapportionment plan formulated by a covered jurisdiction and submitted to the district court during the course of reapportionment litigation. This interpretation is supported by the language of Section 5, its legislative history, and its underlying policies.

A. The Language and Legislative History of Section 5 Require Preclearance of Plans Formulated by Covered Jurisdictions in the Course of Litigation

By its terms, Section 5 applies whenever a covered jurisdiction "enact[s] or seek[s] to administer" a change in voting procedures. Significantly, there are no statutory exceptions to the rule requiring preclearance of all voting changes by covered jurisdictions.

This Court has interpreted this language to permit only one narrow exception to the requirement of preclearance. *Connor* v. *Johnson*, 402 U.S. 690 (1971). This exception, which was endorsed by Congress when it extended the Voting Rights Act of 1965, applies only "where the court, because of exigent circumstances, actually fashions the plan itself * * *." S. Rep. No. 94-295, *supra*, at 19. This is consistent both with the lan-

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[11] This Court reaffirmed the constitutionality of these provisions last Term in *City of Rome* v. *United States*, *supra*.

guage of Section 5, which requires preclearance where the legislative body, not the court, "enact[s] or seek[s] to administer" a new reapportionment plan, and with the policy considerations that are served by avoiding the review of district court orders by an executive agency or by another district court.

Connor v. *Johnson* did not mean, however, that covered jurisdictions could evade the preclearance requirement of Section 5 whenever their voting procedures were challenged in an ongoing reapportionment suit. This was made clear by the Court's decision in *Connor* v. *Waller*, 421 U.S. 656 (1975), a later phase of the same litigation. The Court there held that reapportionment plans enacted by the Mississippi legislature in 1975, while a challenge to that State's earlier 1973 reapportionment plan was pending in the district court, were not and would not be "effective as laws until and unless cleared pursuant to Section 5," 421 U.S. at 656, and that the district court therefore erred in reaching the constitutional claims of racial discrimination under the new plans. (*Ibid.*).

Thus, a district court having jurisdiction of reapportionment litigation involving a covered jurisdiction may not decide whether a new reapportionment plan adopted by the jurisdiction "den[ies] or abridg[es] the right to vote on account of race or color" until the plan has been cleared under Section 5. Instead, when a new reapportionment plan is under consideration in the course of such litigation, the only question for the district court under the statute is whether the plan was formulated by the legislature or whether instead it was devised by the court. Even if a plan proposed by the legislature has not been formally enacted, submission of the plan to a district court for proposed adoption is a means by which the jurisdiction "seek[s] to administer" that plan. Under the language of Section 5, it makes no difference whether the jurisdiction has formally enacted its plan, as it did in *Connor* v. *Waller*, *supra*; whether it has formally authorized its counsel to submit it to the reapportionment

court subject to subsequent enactment if approved, as in *Wise* v. *Lipscomb*, *supra*, and in this case; or whether it proposes through counsel that it be effectuated without enactment by incorporation into the court's decree. In each case the jurisdiction "seek[s] to administer" the new reapportionment plan, so unless it has received clearance under Section 5, the new plan will not be considered "effective as law," and the district court should not address its constitutionality. See *Wise* v. *Lipscomb*, *supra*, 437 U.S. at 542; *Connor* v. *Finch*, 431 U.S. 407, 412 (1979); *Connor* v. *Waller*, *supra*.

Any doubt that this was Congress's express understanding and intent was removed when it reenacted Section 5 in 1975.[12] The Senate Report states that Section 5 is intended to establish

> a form of primary jurisdiction for Section 5 review under which courts dealing with voting discrimination issues should defer in the first instance to the Attorney General or to the District of Columbia District Court.

S. Rep. No. 94-295, *supra*, at 18-19. And, specifically addressing the question at issue here, the Senate Report continues (*ibid.*):

> Thus, for example, where a federal district court holds unconstitutional an apportionment plan which predates the effective date of coverage under the Voting Rights Act, any subsequent plan ordinarily

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[12] Because the language of Section 5 applies to any legislative plan that the jurisdiction "enact[s] or seek[s] to administer," it was not necessary for Congress to change the statutory language in 1975 in order to make Section 5 applicable to a reapportionment plan such as the one at issue here. This Court has stated that "subsequent legislation declaring the intent of an earlier statute is entitled to significant weight" in statutory construction. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969). Such consideration is especially appropriate where, as here, the congressional intent is expressed in legislation extending, without change, the earlier statutory provision, which otherwise would have expired.

> would be subject to Section 5 review. In the typical case, the court either will direct the governmental body to adopt a new plan and present it to the court for consideration or else itself choose a plan from among those presented by various parties to the litigation. In either situation, the court should defer its consideration of—or selection among—any plans presented to it until such time as these plans have been submitted for Section 5 review. Only after such review should the district court proceed to any remaining fourteenth or fifteenth amendment questions that may be raised.

This language, while somewhat ambiguous concerning a possible further extent of the preclearance requirement, makes it entirely clear that preclearance is required for any plan proposed by a governmental body in the course of litigation.

B. The Legislative Purpose In Enacting Section 5 will be Furthered by Requiring Preclearance of Plans in These Circumstances

The policies underlying the Voting Rights Act support the conclusion that preclearance is required whenever a covered jurisdiction "enact[s] or seek[s] to administer" a reapportionment plan reflecting its legislative judgment rather than the judgment of the court.[13] In enacting Sec-

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[13] There is no basis for petitioners' suggestion (Pet. Br. 18-19) that the plan formulated by the Commissioners Court in this case reflected the judgment of the district court rather than the legislative body. Although the commissioners employed a third party to assist them in redrawing the commissioner precincts, the commissioners gave Dr. Nash instructions in the preparation of the plan, provided him with population data, met with him on at least three occasions to discuss the plan, and, prior to approving the plan, requested him to redraw the boundary between Precints 1 and 4 so that the county courthouse would be located in Precinct 1 rather than 4. When asked why the Commissioners Court did not consider either of the two reapportionment plans proposed by respondents, County Judge McDaniel testified that the Commissioners Court would rather "redistrict ourselves" and did not want the draft of their plan to "be polluted by any other plans that might be pre-

tion 5, Congress was not concerned with providing special scrutiny of reapportionment plans devised by federal courts. Instead, it was attempting to prevent covered jurisdictions from "enact[ing] or seek[ing] to administer" any new voting procedure, whatever form that legislative effort might take, until the jurisdiction has demonstrated that its proposed change has neither a discriminatory purpose nor a discriminatory effect.

Although petitioners argue that Section 5 is directed only toward voluntary changes in voting procedures, and not those proposed in response to a court order, neither the language nor the policies of Section 5 support this position. Certainly it would be anomalous to impose the special requirements of Section 5 on those jurisdictions which, on their own initiative, adopt reapportionment plans in an effort to meet constitutional standards, while exempting those which reapportion only in response to constitutional challenges.

If this Court affirms the decision below, legislatures engaged in litigation will be encouraged to develop new plans that comply with Section 5. But if preclearance were not required, legislatures operating under unconstitutional apportionment schemes would have a disincentive to redistricting themselves, since they could avoid complying with Section 5 simply by awaiting suit and proposing a new reapportionment plan to the district court. Then the special protection that Congress intended to apply to all changes in voting procedures which covered jurisdictions formulate and "enact" or otherwise "seek to administer" would be lost. This Court has previously blocked attempts by covered jurisdictions, "which in the past had been so ingenious in their defiance of the spirit of federal law," to circumvent the special remedial provisions

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sented" (J.A. 42). On these facts, it is clear that the commissioners exercised a legislative judgment in approving the proposed plan, even though the commissioners did not personally prepare the details of the plan but instead took the common step of delegating this responsibility to an agent.

of Section 5. *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110, 121 (1978).

C. Petitioners' Objections to Preclearance are not Persuasive

1. *Preclearance Will Not Interfere With The District Court's Equitable Powers To Remedy Constitutional Violations*

The authority of the federal courts to remedy deprivations of voting rights protected by the Fourteenth and Fifteenth Amendments is well established. *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). In the area of state and local reapportionment, federal court intervention is necessary because other avenues of relief are not available for the effective redress of constitutional rights. *Reynolds* v. *Sims*, *supra*, 377 U.S. at 570. With respect to claims of voting discrimination based on race or language, the administrative and judicial procedures of Section 5 of the Voting Rights Act of 1965 provide a special means of protection. Section 5 was designed in part to prevent abridgement of voting rights by means of reapportionment. *Georgia* v. *United States*, 411 U.S. 526 (1973).[14]

These avenues of relief are complementary, not mutually exclusive. When an existing apportionment plan is challenged and invalidated in the course of litigation under the Fourteenth or Fifteenth Amendments, the district court, wherever possible, must give the legislative body an opportunity to formulate a new plan that meets constitutional standards. See, *e.g.*, *Wise* v. *Lipscomb*, *supra*, 437 U.S. at 539-542; *Connor* v. *Finch*, *supra*, 431 U.S. at 414-415. After the legislature exercises its legislative judgment and proposes a new plan, that proposal

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[14] The Attorney General and the District Court for the District of Columbia have no authority, however, to examine possible violations of the principle of one-person, one-vote independent of their statutory power to examine claims of discrimination based on race, color or language.

must be submitted to the Attorney General or the United States District Court for the District of Columbia for clearance under Section 5.

If Section 5 preclearance is obtained from the Attorney General, the reapportionment court, in considering the constitutionality of the plan, may consider the Attorney General's lack of objection along with other factors bearing on the constitutionality of the plan. See *Morris* v. *Gressette*, 432 U.S. 491, 505 (1977). On the other hand, if the Attorney General objects, the covered jurisdiction retains the option of seeking a favorable declaratory judgment from the District Court for the District of Columbia. *Id.* at 505 n.21. If the plan fails to receive clearance from the Attorney General or the District Court for the District of Columbia, the jurisdiction must devise a new reapportionment plan that meets Section 5 standards. Only after preclearance is received may the reapportionment court address constitutional challenges to the plan based on racial or language discrimination. *Wise* v. *Lipscomb*, *supra*, 437 U.S. at 542; *Connor* v. *Waller*, *supra*.

This procedure not only reconciles the primary jurisdiction created by Section 5 with the responsibilities of reapportionment courts, but is consistent with the limited role federal courts should play in reapportionment (*Wise* v. *Lipscomb*, *supra*, 437 U.S. at 539-540) and advances the important purposes underlying Section 5 (*South Carolina* v. *Katzenbach*, *supra*). In addition, it in no way detracts from the concern implicit in *Connor* v. *Johnson*, *supra*, that a district court order announcing a reapportionment plan not be subjected to review by an executive agency or by another district court. By requiring Section 5 preclearance of a legislature's proposed plan *prior* to submission to or approval by the court, any interference with the legitimate prerogatives of the district court is avoided.[15]

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[15] Since the jurisdiction's plan is precleared prior to submission to the reapportionment court, this procedure also avoids the practical problem of distinguishing between a legislative and a judicial reapportionment plan where the court makes minor changes in the

Contrary to petitioners' suggestion (Pet. Br. 26-28), this approach does not impermissibly interfere with the district court's equitable powers to remedy violations of the one-person, one-vote standard or other constitutional violations.[16] Nor does it leave voters in jurisdictions operating under unconstitutional apportionment schemes without a remedy pending preclearance. As the court specified in *Connor* v. *Waller*, *supra*, 421 U.S. at 656-657, and as it reiterated in *Wise* v. *Lipscomb*, *supra*, 437 U.S. at 542, the reapportionment court retains the authority in appropriate circumstances to devise and implement its own interim plan to govern upcoming elections. See also S. Rep. No. 94-295, *supra*, at 19. And after the legislature's plan has been precleared, the reapportionment court has the ultimate authority to determine whether the covered jurisdiction's proposed plan meets the applicable constitutional standards. See, *e.g.*, *Connor* v. *Finch*, *supra*, 431 U.S. at 414-420. Pending preclearance, however, the local district court is to stay consideration of all constitutional issues concerning the covered jurisdiction's proposed plan, just as judicial or administrative proceedings are stayed pending proceedings on particular issues in another tribunal with primary jurisdiction. See, *e.g.*, *California* v. *FPC*, 369 U.S. 482, 490 (1962) (administrative action should have been stayed pending judicial proceeding); *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973); *Carnation Co.* v. *Pacific Westbound Conference*,

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covered jurisdiction's proposal. Where because of exigent circumstances prior preclearance is impossible and the district court is required to devise its own interim plan, the covered jurisdiction would, of course, retain its rights as a litigant to comment on tentative plans formulated by the court and otherwise to provide technical information or expertise to the court. Preclearance of the resulting plan would be required only if the jurisdiction's input into the plan so dominates the formulation process that the resulting proposal, on balance, "reflect[s] the policy choices of the elected representatives of the people, rather than the remedial directive of a federal court." *Wise* v. *Lipscomb*, *supra*, 437 U.S. at 548 (concurring opinion of Justice Powell).

[16] See note 14, *supra*.

383 U.S. 213, 222-224 (1966) (judicial proceedings stayed pending administrative action). Indeed, this procedure was expressly authorized by this Court in *Wise* v. *Lipscomb*, *supra*, 437 U.S. at 542, and *Connor* v. *Waller*, *supra*, and has been followed in cases alleging violations of both Section 5 and the Constitution. See, *e.g.*, *United States* v. *Clarke County Commission, Clarke County, Alabama*, Civ. No. 80-0547-P (S.D. Ala. Oct. 24, 1980) (three-judge court); see also *United States* v. *Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642 (1977).

The Voting Rights Act itself, and particularly its extensions (see pages 14-15, *supra*), represent a balancing by Congress of the disadvantages of delay and other possible administrative difficulties against the need for adherence to the procedures of Section 5. The requirement that reapportionment courts not pass on proposals of covered jurisdictions until they obtain Section 5 clearance reflects the results of that balancing. Thus, the preclearance requirement does have a congressionally authorized potential for delaying final approval of the plan by the reapportionment court if the covered jurisdiction litigates the issue of whether its proposed plan meets Section 5 standards in the District Court for the District of Columbia. However, Congress also provided covered jurisdictions with the more expedient option of instead submitting their proposals for administrative review by the Attorney General who has 60 days within which to interpose an objection, 42 U.S.C. 1973c.[17] This alternative was designed "to provide a speedy alternative method of compliance to covered States." *Morris* v. *Gressette*, *supra*, 432 U.S. at 503; see also *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 549. If the Attorney General fails to interpose a timely objection based on a complete submission, this action is not reviewable and "[t]he extraordinary remedy of postponing the implementation of validly enacted state legislation * * * come[s] to an end * * *." *Morris* v. *Gressette*, *supra*, 432 U.S. at 504.

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[17] The jurisdiction may shorten the 60-day period by seeking expedited review from the Attorney General. 28 C.F.R. 51.22.

Congress has thus provided a means of minimizing the potential for delay inherent in Section 5 procedures.

This case itself suggests that petitioners' concern that preclearance will impose unacceptable delays is unfounded. One year elapsed between the time the commissioners submitted their proposed plan to the district court in November 1979, and the November 1980 elections for County Commissioner in Precincts 1 and 3 for which the plan was designed. Had the commissioners instead submitted the plan to the Attorney General in November of 1979, preclearance could have been obtained within ample time to implement the proposal for the 1980 elections if the plan met Section 5 standards. If the Attorney General had objected to the plan and the commissioners were then unable to obtain preclearance for any other proposal prior to the 1980 election, the district court could have devised and ordered into effect its own reapportionment plan pursuant to *Connor* v. *Johnson, supra.*

2. *Review by the District Court of a Covered Jurisdiction's Proposed Reapportionment Plan is not an Effective Substitute for Section 5 Preclearance*

There is no merit to petitioners' suggestion that Section 5 preclearance is unnecessary in this case or, indeed, in any voting rights litigation, because "[t]he function contemplated to be served by Section 5 has already been performed" by the district court (Pet. Br. 35). One of the reasons Congress enacted Section 5 was that case-by-case litigation had proven inadequate to enforce Fifteenth Amendment rights. *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 314. Section 5, accordingly, is not simply a substitute for case-by-case litigation. As we have noted (*supra,* pages 11-12), the special protection of Section 5 is achieved by placing the burden of proof on the covered jurisdiction rather than the plaintiff, and by requiring the jurisdiction to demonstrate that its plan has neither the purpose nor the effect of denying or abridging the right to vote on the basis of race, color

or language. *City of Rome* v. *United States, supra*; cf. *United States* v. *Sheffield Board of Commissioners, supra*, 435 U.S. at 121. Section 5 includes the requirement that "no voting-procedure changes * * * be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U.S. 130, 141 (1976). In contrast, proof of retrogression alone is not sufficient to establish a constitutional claim of voting discrimination based on race, color or language. *City of Mobile* v. *Bolden, supra.*[18]

Although Congress could have provided that the local district court was to apply Section 5 standards in evaluating the covered jurisdiction's proposed reapportionment plan,[19] the plain language of Section 5 as consistently interpreted by this Court vests primary jurisdiction to resolve the substantive questions of voting discrimination under Section 5 solely in the Attorney General and the District Court for the District of Columbia. See, *e.g.*, *United States* v. *Board of Supervisors of Warren County, Mississippi, supra*, 429 U.S. at 646; *Connor* v. *Waller, supra; Perkins* v. *Matthews, supra*, 400 U.S. at 383, 385; *Allen* v. *State Board of Elections, supra*, 393 U.S. at 557-560. This grant of exclusive primary jurisdiction was intended to ensure that the substantive standards imposed by Section 5 are uniformly applied throughout all covered states and political subdivisions. *Hearings on S. 1564 Before the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., Pt. 1, 69-73 (1965). The desired uniformity would be lost if local reappor-

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[18] There is even less potential for duplication where, as here, the constitutional violation being remedied by the district court is based on one-person, one-vote principles rather than a claim that the existing apportionment scheme unconstitutionally dilutes the voting strength of a particular minority group.

[19] For example, district courts have similar authority under 42 U.S.C. 1973a(c), which applies to jurisdictions that are not covered under Section 4 of the Act and therefore are not subject to the preclearance requirements of Section 5. See H.R. Rep. No. 439, 89th Cong., 1st Sess. 13, 23 (1965).

tionment courts were to apply Section 5 standards independently.

In addition, the centralization of responsibility for the enforcement of the standards assures that they will be given the high priority Congress intended. The danger that Section 5 claims will not be adequately presented or reviewed in the local district court is particularly acute in one-person, one-vote cases, where the plaintiffs are frequently white; they may have no interest in and therefore never raise the question of the impact of the proposed plan on minority groups in the community. Even if the issue is raised, the district court may not be sensitive to the particular concerns that led to the enactment of Section 5. For example, in the instant case, although the respondents argued that the Commissioners' proposed plan had a discriminatory effect on Mexican-Americans because it reduced their voting strength in Precinct 1 from 40 to 24%, the district court in approving the plan did not address this claim. This case itself thus suggests that the statutory obligation imposed by Section 5 can most effectively be met if preclearance is required before the district court considers the proposed plan.

II.

WISE v. *LIPSCOMB* TEACHES THAT THE REAPPORTIONMENT PLAN FORMULATED BY THE COMMISSIONERS COURT IS A LEGISLATIVE PLAN AND IS THEREFORE SUBJECT TO PRECLEARANCE UNDER SECTION 5 OF THE VOTING RIGHTS ACT OF 1965

Wise v. *Lipscomb*, *supra*, makes clear that the determination of whether a reapportionment plan is to be treated as legislative or as judicial depends on whether it was devised by the legislature or the court; a plan that is prepared and becomes effective as a result of a court order can nevertheless qualify as a legislative plan, so long as it reflects the legislative judgment of the covered jurisdiction, rather than the remedial directive of the federal court. Accordingly, the Court's decision in *Wise* both supports the interpretation of Section 5 out-

lined above and provides an independent basis for affirming the court of appeals' decision. Although the issue in *Wise* was whether the plan there should be evaluated under the judicial review standards applicable to legislative plans or those applicable to judicial plans, the Court's analysis of the distinction between the two types of plans applies with equal force to the Section 5 question presented here.

A. Under the Criteria Set Forth in *Wise* v. *Lipscomb*, the Reapportionment Plan Formulated by the Commissioners Court in this Case Qualifies as a Legislative Plan

In *Wise* v. *Lipscomb*, *supra*, both Justice White, announcing the Court's judgment, and Justice Powell, concurring, focused on the legislative origin of the plan at issue in concluding that, although it was promulgated pursuant to court order, it should not have been evaluated under the more stringent standards applicable to judicially devised plans.[20] Justice White's opinion con-

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[20] As Justice Marshall recognized in his dissenting opinion in *Wise*, *supra*, 437 U.S. at 552, the majority's conclusion in *Wise* cannot be reconciled with the Court's footnote statement in *East Carroll Parish*, *supra*, 424 U.S. at 638 n.6, that "court-ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by Section 5." This was recognized in Justice Powell's opinion as well, which limits *East Carroll Parish* to "its peculiar facts," 437 U.S. at 549. It is not necessary, however, to overrule *East Carroll Parish* in order to find *Wise* applicable to the question presented here. In *East Carroll Parish*, the state enabling legislation had been disapproved by the Attorney General under Section 5. The significance of this fact, which is not present in either *Wise* or this case, was properly assessed in Justice Powell's concurring opinion in *Wise* (437 U.S. at 549):

> This determination meant that the specific plans proposed by the school board and police jury in that case would have had unlawful effects. Because their legislative judgment had been found tainted in that respect, it followed that the normal presumption of legitimacy afforded the balances reflected in legislative plans, see *Burns* [v. *Richardson*, 384 U.S. 73, 84-85 (1966)], could not be indulged.

cluded that "the body governing Dallas validly met its responsibility of replacing the apportionment provision invalidated by the District Court with one which could survive constitutional scrutiny" (437 U.S. at 546). In Justice Powell's view, the authority under state law of the legislative body to enact the plan was not significant (437 U.S. at 548):

> The essential point is that the Dallas City Council exercised a legislative judgment, reflecting the policy choices of the elected representatives of the people, rather than the remedial directive of a federal court. As we held in *Burns* [v. *Richardson*, 384 U.S. 73 (1966)] at 85, "a State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause." This rule of deference to local legislative judgments remains in force even if, as in *Burns*, our examination of state law suggests that the local body lacks authority to reapportion itself.

We agree with this analysis. In particular, the preclearance requirement of Section 5 should not depend on whether the jurisdiction had unrestricted authority under state law to enact the proposed plan. This follows from the plain language of Section 5, and is supported by sound policy considerations as well. States and political subdivisions should not be invited to avoid complying with the Act by proposing reapportionment plans that do not meet state law requirements. Moreover, for covered jurisdictions, Section 5 imposes a uniform standard, not one that varies from state to state depending on the peculiarities of local law. As this Court's opinions in *Wise* v. *Lipscomb*, *supra*, illustrate, the subtle questions of state law that arise in this context evade ready and consistent resolution and are not questions to which the federal courts bring any particular expertise.[21]

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[21] For similar reasons, whether the legislative body purported to reapportion itself should not be significant. Compare *Wise* v. *Lips-*

In any event, the facts in this case parallel those in *Wise* v. *Lipscomb*, *supra*; even under Justice White's approach the plan formulated and adopted by the Commissioners Court in this case qualifies as a legislative plan. Contrary to petitioners' suggestion (Pet. Br. 16), the Commissioners Court had full authority under state law to reapportion the commissioner precincts.

The Texas Constitution expressly authorizes the Commissioners Court to divide the county into four commissioner precincts "from time to time, for the convenience of the people * * *." Tex. Const. Ann. art. 5, § 18 (Vernon 1955). This power has been broadly interpreted by the state courts: "When the [commissioners] court was once established, no legislation was needed to enable it to exercise [this power] * * *. The direction is plain and simple, and without condition of restriction * * *." *State* v. *Rigsby*, 43 S.W. 271, 273 (Tex. Ct. Civ. App. 1897).

The plan proposed by the Commissioners Court did not violate any state statutory restriction on the commissioners' reapportionment power. Article 2.04(1) of the Texas Election Code, the only statutory provision cited by petitioners, applies to alterations in *election* precinct lines, not to alterations in *commissioner* precinct lines. Election precincts are the electoral sub-units of commissioner precincts and determine where individual voters are registered and where they vote. Article 2.04(1) restricts "changes in election precincts" to the July or August term (Tex. Elec. Code Ann. art. 2.04(1) (Vernon Supp. 1979)). The purpose of this statutory provision is to prevent the "confusion in election processes" that would result from altering election precinct boundaries, and therefore polling places and registration lists, immediately before an election. *Wilson* v. *Weller*, 214 S.W.2d 473, 474 (Tex. Ct. Civ. App. 1948). Although the plan proposed by the Commissioners in this case al-

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comb, supra, with *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636, 638 n.6 (1976). This factor can also be readily manipulated by the legislature by carefully limiting the wording of its endorsement of the proposed plan, as the Commissioners Court attempted to do in this case (see App. 1a-3a, *infra*).

ters the boundaries of the commissioner precincts, it does not renumber or alter the boundaries of the election precincts. Under the plan, election precincts are transferred from one commissioner precinct to another, but all voters continue to vote in the same election precinct.[22]

Even assuming, arguendo, that the commissioners' plan altered election precinct lines in violation of Article 2.04 (1), the Commissioners Court had at least as much authority to reapportion itself as the City Council did in *Wise*. Once the existing apportionment scheme was invalidated, the Commissioners Court, like the Dallas City Council, had inherent power to fill the void created by the court's declaration of unconstitutionality. See *Mauzy* v. *Legislative Redistricting Bd.*, 471 S.W.2d 570 (Tex. Sup. Ct. 1971). It merely accelerated the timing of its reapportionment proposal in response to the court's decision. Certainly this state statute presents no more serious impediment to legislative authority than the requirement in *Wise* that the City Charter be amended by popular vote. In contrast to *East Carroll Parish, supra*, in neither *Wise* nor this case had the Attorney General interposed an objection to state enabling legislation. Accordingly, the court of appeals correctly concluded that the reapportionment plan was legislative under this Court's decision in *Wise* v. *Lipscomb*.

B. The Principles Announced in *Wise* v. *Lipscomb* Apply With Equal Force to the Question of Section 5 Preclearance Presented Here

On September 18, 1975, while *Wise* was pending in the court of appeals, Texas and its political subdivisions

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[22] It is true that four election precincts are "split" between two commissioner precincts; certain residents of these election precincts vote for one commissioner position and the remaining residents vote for the other commissioner position. However, because the boundaries of the election precincts were not redrawn, the registration lists and polling places remain the same (J.A. 47-48). The plan has thereby avoided the "confusion in election processes" that Article 2.04 was designed to prevent. *Wilson* v. *Weller, supra.*

became subject to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c (see page 11, *supra*). Although the United States argued in its amicus brief in this Court that the Dallas City Council's reapportionment plan was subject to preclearance under Section 5 (*Wise* v. *Lipscomb*, No. 77-529, Brief of the United States as Amicus Curiae 32-36), the Court declined to address the retroactive application of Section 5 because this issue had not been raised by the parties or considered by the court of appeals (*Wise* v. *Lipscomb*, *supra*, 437 U.S. at 547, 549, 550). The Court's discussion of the difference between legislative and judicial reapportionment plans, for purposes of determining the appropriate level of judicial scrutiny to be used in evaluating them, nevertheless applies with equal force to the Section 5 question presented in this case, which is unencumbered by issues of its retroactive application.

The Court's treatment of the distinction in *Wise* is fully consistent with and merely extends the reasoning of its prior Section 5 decisions in *Connor* v. *Johnson*, *supra*, and *Connor* v. *Waller*, *supra*. Moreover, the Court in these decisions and in others has afforded parallel treatment to the related determinations of whether preclearance is required under Section 5 and whether the plan should be evaluated under constitutional requirements or also under the more stringent federal court remedial standards. For instance, in *Connor* v. *Waller*, *supra*, 421 U.S. at 656-657, the Court authorized the district court, pending preclearance of the legislative plan under Section 5, "to entertain a proceeding to require the conduct of the 1975 elections pursuant to a court-ordered reapportionment plan that complies with this Court's decisions in *Mahan* v. *Howell*, 410 U.S. 315 (1973); *Connor* v. *Williams*, 404 U.S. 549 (1972); and *Chapman* v. *Meier*, 420 U.S. 1 (1975)." The implication of this alternative is clear: Either a reapportionment plan is subject to preclearance under Section 5 as a legislative plan that the covered jurisdiction "enact[s] or seek[s] to administer," or the plan is subject to the more stringent

remedial standards applicable to judicially devised reapportionment plans.

Subsequently, in *East Carroll Parish, supra*, the Court determined that the reapportionment plan at issue there was judicial rather than legislative for both purposes; consequently, the remedial principle favoring single-member districts applied but the preclearance requirements of Section 5 did not. Its only discussion of the distinction between legislative and judicial reapportionment plans occurred in the footnote on Section 5 (424 U.S. at 638 n.6). And in *Wise* v. *Lipscomb* itself, the Court again recognized that the determination of whether a reapportionment plan is legislative or judicial is the same for purposes of both Section 5 and the remedial standards under which the plan should be evaluated. Each of the opinions attempts to reconcile the Court's conclusion in *Wise* with the footnote language in *East Carroll Parish, supra*, 424 U.S. at 638 n.6, categorizing the plan at issue there as a judicial plan not subject to Section 5 preclearance. *Wise* v. *Lipscomb, supra*, 437 U.S. at 545-546, 548-549, 551-552. Most recently, Justice Powell, in his opinion granting a stay in this case, treats *Wise* as directly on point. *McDaniel* v. *Sanchez*, No. 80-180 (Aug. 14, 1980), slip op. 3-4. (Powell, Circuit Justice). See also *Marshall* v. *Edwards*, 582 F.2d 927, 931-934 (5th Cir. 1978); *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1301-1302 (5th Cir. 1973).

Even if the question were an open one, the policies underlying Section 5 of the Voting Rights Act of 1965 suggest that preclearance should be required of all reapportionment plans that qualify as "legislative" under *Wise* and therefore are not subject to the stricter standards applicable to judicially-devised plans. As we have noted (pages 9-12, *supra*), Congress concluded, based on the past history of voting discrimination by covered jurisdictions, that the legislative judgment of these jurisdictions is not entitled to the deference normally afforded to state and local legislatures. See *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). Under Section

5, the legislative judgment of these jurisdictions is subject to special scrutiny to ensure that proposed new election procedures have neither the purpose nor the effect of denying or abridging the right to vote on account of race, color or language. *City of Rome* v. *United States*, *supra*. Where a covered jurisdiction in the course of litigation formulates and proposes a new reapportionment plan to replace an unconstitutional scheme, the exercise of this legislative judgment is not subject to the stricter standards governing judicially-devised reapportionment plans. *Wise* v. *Lipscomb*, *supra*. Because a legislative judgment is exercised, however, the covered jurisdiction's plan remains subject to the independent requirements of Section 5. S. Rep. No. 94-295, 94th Cong., 1st Sess. 18-19 (1975). Any other result would permit a substantial group of reapportionment plans—proposed by jurisdictions with a long history of voting discrimination—to go into effect with neither heightened judicial scrutiny nor the special scrutiny prescribed by Section 5.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Attorneys

DECEMBER 1980

APPENDIX

SPECIAL SESSION—NOVEMBER 1, 1979

BE IT REMEMBERED, that on this 1st day of November, A.D. 1979, the Commissioners Court of Kleberg County, Texas, met in Special Session, to consider the following business, to-wit:

PRESENT: Hon. W. C. McDaniel, County Judge, Presiding
Doyle Dreyer, Commissioner, Precinct #1
V.T. Collins, Commissioner, Precinct #2
Earl Hubert, Commissioner, Precinct #3
Romeo Lomas, Commissioner, Precinct #4
Ura Dean Ware, County Clerk

IN THE MATTER OF
CONTINUING CETA PROGRAM
IN KLEBERG COUNTY AS CETA

It appearing to the Court that it would be advantageous to continue the CETA program under Title 2D and Title VI of said program which has formerly been administered by the City of Kingsville. Motion was made by Commissioner Dreyer, and seconded by Commissioner Lomas that Kleberg County continue such program. Upon vote, motion carried with Commissioners Collins and Hubert voting NO.

IN THE MATTER OF
ADMINISTRATION OF CETA PROGRAM

Motion was made by Commissioner Lomas and seconded by Commissioner Dreyer, that the CETA Program be administered under the general supervision of the County Auditor's Department and the hiring of any personnel thereunder must first have the approval of this Commissioners' Court. Upon vote, motion carried unanimously.

IN THE MATTER OF RE-DISTRICTING
COMMISSIONERS' PRECINCTS

It appearing to the Court that sufficient information has been furnished to this body to redistrict the Commissioners' precincts according to one man, one vote, as evidenced by the 1970 census, and as ordered by Federal District Judge Owen D. Cox. Motion was made by Commissioner Hubert and seconded by Commissioner Collins that the map be approved and that such precincts be numerically as follows:

Precinct 1	8,242
Precinct 2	8,324
Precinct 3	8,385
Precinct 4	8,307

and that such plans be submitted to the Federal District Judge in Corpus Christi for approval. Upon vote, motion carried unanimously.

With no further business at hand to be considered by the Court at this time, adjournment was had.

/s/ W.C. McDaniel

W.C. MCDANIEL, County Judge

ATTEST: Ura Dean Ware

URA DEAN WARE, County Clerk

THE STATE OF TEXAS)
)
COUNTY OF KLEBERG)

I, Ura Dean Ware, Clerk of the County Court of Kleberg County, Texas, do hereby certify that the above and foregoing is a true and correct Copy of Commissioners Court Special Session of November 1, 1979, as the same now appears of record in my office in Volume 6, page 62 of the Minutes of Commissioners Court, Records of Kleberg County, Texas.

Given under my hand and seal of office, at office in Kingsville, Texas, this 21st day of January, A.D. 1980.

Ura Dean Ware
Clerk, County Court, Kleberg County, Texas

/s/ Fina Scramuzza, Deputy

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